Present: Keenan, Koontz, Kinser, Lemons, Goodwyn, and Millette, JJ. and Russell, S.J.

VOLKSWAGEN OF AMERICA, INC.

v.

DEMERST B. SMIT, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES, ET AL.

Record No. 082305

OPINION BY
JUSTICE LAWRENCE L. KOONTZ, JR.
February 25, 2010

FROM THE COURT OF APPEALS OF VIRGINIA

In a prior appeal, this Court reversed a decision of the Commissioner of the Virginia Department of Motor Vehicles ("DMV") finding that, during the period of October 1997 through March 1998, Volkswagen of America, Inc. ("Volkswagen") violated Code § 46.2-1569(7) when it failed to supply certain high-demand models of vehicles imported by Volkswagen for distribution to its franchise dealers in the United States to Miller Auto Sales, Inc. ("Miller Auto"), a Volkswagen franchise dealer in Winchester. *Volkswagen of America, Inc. v. Smit*, 266 Va. 444, 453-54, 587 S.E.2d 526, 531-32 (2003) (hereinafter, "*Volkswagen II*"). That appeal arose from a judgment of the Court of Appeals of Virginia,

which had affirmed an order of the Circuit Court of the City of Richmond upholding the Commissioner's decision. *Volkswagen of America, Inc. v. Quillian*, 39 Va. App. 35, 69, 569 S.E.2d 744, 761 (2002) (hereinafter, "*Volkswagen I*"). In reversing the judgment of the Court of Appeals, we held that the Commissioner had erroneously interpreted Code § 46.2-1569(7) and consequently improperly focused on the business judgment of Volkswagen, rather than limiting the inquiry to the relevant factors prescribed by the statute. *Volkswagen II, 266 Va. at 453-54*, 587 S.E.2d at 531-32. We also vacated that portion of the Court of Appeals' decision in *Volkswagen I* that addressed Volkswagen's challenge to Code § 46.2-1569(7) alleging both that the statute violates principles of the dormant Commerce Clause of the United States Constitution and is unconstitutionally vague in violation of the Due Process Clauses of the United States and Virginia Constitutions. *Id.* at 454, 587 S.E.2d at 532 (citing the established principle of constitutional law that a court will not rule upon the constitutionality of a statute unless such a determination is absolutely necessary to decide the merits of the case); see *Klarfeld v. Salsbury*, 233 Va. 277, 286, 355 S.E.2d 319, 324 (1987).

Following the remand to the DMV and further proceedings before the Commissioner, Volkswagen was again found to have violated Code § 46.2-1569(7). This decision was appealed again through the circuit court and the Court of Appeals, with Volkswagen renewing its constitutional challenges to the statute, as well as contesting the Commissioner's decision on the merits. Upon appeal from the

decision of the circuit court, the Court of Appeals, *Volkswagen of America, Inc. v. Smit*, 52 Va. App. 751, 799, 667 S.E.2d 817, 841 (2008) (hereinafter, "*Volkswagen III*"), affirmed the Commissioner's decision. In doing so, the Court of Appeals affirmed the circuit court's holding that Code § 46.2-1569(7) was neither void for vagueness nor violative of dormant Commerce Clause principles. *Id.* at 795, 799, 667 S.E.2d at 839, 841.

Volkswagen appealed the judgment of the Court of Appeals by petition to this Court, challenging both the decision upholding the Commissioner's finding that its actions violated Code § 46.2-1569(7) and the determination that the statute was not constitutionally infirm. By an order dated April 14, 2009, we awarded Volkswagen this appeal limited to the dormant Commerce Clause and due process issues.

BACKGROUND

Because we have previously given extensive recitation to the factual and procedural background of this case in *Volkswagen II*, 266 Va. at 447-51, 587 S.E.2d at 528-30, and the issues in this appeal address only the Commerce Clause and due process challenges to the statute at issue, we will limit our recitation of the facts to those necessary to resolve the appeal upon the issues presented.

As relevant to the time at which its dispute with Miller Auto arose, Volkswagen imported vehicles from Volkswagen AG, its German parent corporation, and distributed them to approximately

600 franchise dealers in the United States, including its dealers in Virginia. For vehicle models for which demand exceeded supply, Volkswagen used a national allocation procedure to distribute vehicles to its dealers based on a mathematical algorithm to determine a "Dealer Allocation Percentage" designed to deliver vehicles where they were most likely to be sold and where they were most needed because of low inventory. Volkswagen's "Area Executives" were given the authority to adjust the algorithm's results for each dealer within the executive's geographic region based on various factors, including a dealer's customer satisfaction survey scores, local market conditions, and minimum stocking requirements of the dealer's franchise agreement.

Miller Auto was the lowest volume dealer among Volkswagen's dealers in its dealer sales district, which included seven Volkswagen dealers in northern Virginia as well as four dealers in Maryland and one in Washington, D.C. During 1997, for example, Miller Auto sold 47 new Volkswagens of all models, while during the same period the two largest Volkswagen dealers in Virginia each sold over 1000 new Volkswagens of all models. Miller Auto, which had franchise agreements for several other automobile lines, concedes that sales of all models supplied by Volkswagen accounted for only approximately ten percent of its sales volume.

In the period immediately preceding the dispute between Volkswagen and Miller Auto, the supply of all the models in Volkswagen's line of vehicles available for distribution to dealers generally exceeded demand and, thus, it was not

necessary for Volkswagen to use the dealer allocation percentage to determine how many vehicles a particular dealer was entitled to receive. However, in the fall of 1997, Volkswagen introduced a new 1998 model of the Passat and in early 1998 introduced the New Beetle model. Because demand for these vehicles initially far exceeded supply, Volkswagen used the national allocation procedure to determine how many of these vehicles its dealers were entitled to receive.

It is not disputed that during the period of October 1997 to March 1998 Volkswagen imported 18,454 Passats, and during the period of February to March 1998 Volkswagen imported 5,637 New Beetles. Miller Auto requested delivery from Volkswagen of one or more 1998 Passats and New Beetles during those respective timeframes, but received no shipments of either vehicle until after March 1998.[1] While it is also not disputed by Miller Auto that the demand for Passats and New Beetles during the relevant timeframes exceeded the available supply, there is no conclusive evidence in the record as to actual level of national dealership demand, either as to the number of dealers requesting delivery of the two vehicle models or of the total number of vehicles requested by all dealers.

In any case, the delivery of this one vehicle was not germane to the Commissioner's ultimate determination that Volkswagen had violated Code §

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[1] Miller Auto received delivery of one Passat in December 1997, apparently by transfer from another dealer, and it was not clear whether this vehicle was a 1998 or earlier model.

46.2-1569(7), nor is it relevant to our resolution of the issues raised in this appeal, since the Commissioner determined that this vehicle was not delivered by Volkswagen.

On February 9, 1998, John C. Miller, Vice President of Miller Auto, advised Volkswagen by letter that Miller Auto was dissatisfied with the manner in which new vehicles were being allocated to it. Miller expressly stated his belief that Volkswagen's allocation procedure violated Code § 46.2-1569(7). Miller sent a copy of this letter to the DMV.

As relevant to Miller's compliant, Code § 46.2-1569(7) provides that:

> Notwithstanding the terms of any franchise agreement, it shall be unlawful for any [motor vehicle] manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or their representatives:
>
> . . . .
>
> 7. To fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model *equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise.*

(Emphasis added.)[2]

After mediation of the dispute between Miller Auto and Volkswagen pursuant to Code § 46.2-1572.2 proved fruitless, the Commissioner instituted formal proceedings against Volkswagen. As indicated above, those proceedings resulted in a determination by the Commissioner that Volkswagen had violated Code § 46.2-1569(7), but that this Court overturned that determination in *Volkswagen II*.

Upon remand, the record was not substantially enlarged as to any relevant factor. The Commissioner again determined, based upon his interpretation of what level of distribution of the two vehicle models at issue would be "equitably related to the total new vehicle production or importation currently being achieved nationally," that Volkswagen had violated Code § 46.2-1569(7) with respect to its dealings with Miller Auto. Specifically, the Commissioner found that regardless of the methodology used to allocate vehicles among dealers, the "allocation[] of zero vehicles [to a dealer] of a certain make, series, or model for one or more months would not be equitable." The Commissioner expressly limited his finding to the facts of this case where the requested vehicle was a new model and "where no meaningful history of dealer or national sales exist for the new vehicle." However, the

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[2] Nearly identical language to that in Code § 46.2-1569(7) also appears in Code § 46.2-1976(9), relating to distribution of motor homes and travel trailers, Code § 46.2-1992.69(9), relating to distribution of other types of trailers, and Code § 46.2-1993.67(9), relating to the distribution of motorcycles.

Commissioner concluded that there was no specific statutory sanction provided for such violation and, that in any case, given the length of time since the violation, and because Volkswagen was no longer using the relevant allocation procedures and "there was no evidence presented at the hearing to indicate that Volkswagen was currently in violation of any of the provisions contained within Title 46.2," the Commissioner determined that no sanction against Volkswagen was warranted.

Both the circuit court and subsequently the Court of Appeals in *Volkswagen III* gave a thorough analysis of the Commerce Clause and due process challenges to the application of Code § 46.2-1569(7) raised by Volkswagen in appealing the Commissioner's determination. Because this Court will review these questions of law de novo, it is not necessary to recount here the analysis that each court used to determine that the statute was not unconstitutional. See *Appalachian Voices v. State Corp. Comm'n*, 277 Va. 509, 516, 675 S.E.2d 458, 461 (2009) (constitutional arguments are questions of law that this Court reviews de novo).

DISCUSSION

Our review of Volkswagen's challenge to the application of Code § 46.2-1569(7) in this case begins with the well established principle that duly enacted laws are presumed to be constitutional. *Tanner v. City of Virginia Beach*, 277 Va. 432, 438, 674 S.E.2d 848, 852 (2009). "We are required to resolve any reasonable doubt concerning the constitutionality of a law in favor of its validity. Thus, if a statute or

ordinance can be construed reasonably in a manner that will render its terms definite and sufficient, such an interpretation is required." *Id.* at 438-39, 674 S.E.2d at 852 (citations omitted). "Nevertheless, construing statutes to cure constitutional deficiencies is allowed only when such construction is reasonable. A statute cannot be rewritten to bring it within constitutional requirements." *Jaynes v. Commonwealth*, 276 Va. 443, 464, 666 S.E.2d 303, 314 (2008) (citation omitted).

Because our jurisprudence favors upholding the constitutionality of properly enacted laws, we have recognized that it is possible for a statute or ordinance to be facially valid, and yet unconstitutional as applied in a particular case. See, e.g., *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004); see also *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)("a statute . . . may be held constitutionally invalid as applied . . . although its general validity as a measure enacted in the legitimate exercise of state power is beyond question"). "The 'usual judicial practice' is to address an as-applied challenge before a facial challenge because it generally will be more 'efficien[t],' because this sequencing decreases the odds that facial attacks will be addressed 'unnecessarily' and because this approach avoids encouraging 'gratuitous wholesale attacks upon state and federal laws.' " *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 327-28 (6th Cir. 2009) (quoting *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989); see also *Mahan v. National Conservative Political Action Committee*, 227 Va.

330, 340, 315 S.E.2d 829, 835 (1984) (upholding declaratory judgment that facially valid statute was nonetheless unconstitutional as applied).

" '[V]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.' " *Motley v. Virginia State Bar*, 260 Va. 243, 247, 536 S.E.2d 97, 99 (2000) (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)). As we observed in *Volkswagen II*, a court should not declare a statute to be wholly unconstitutional "unless such a determination is absolutely necessary to decide the merits of the case." 266 Va. at 454, 587 S.E.2d at 532. Thus, Volkswagen's due process challenge does not require us to determine whether Code § 46.2-1569(7) is facially invalid if we determine that the statute is constitutionally infirm as applied on the facts of this case. Accordingly, we will first consider Volkswagen's assertion that Code § 46.2-1569(7) as applied by the Commissioner in this case violated due process because the statute is impermissibly vague in that the statute failed to provide adequate notice to Volkswagen as to what conduct it prohibits.

In *Tanner*, we explained that "[t]he constitutional prohibition against vagueness derives from the requirement of fair notice embodied in the Due Process Clause[s]" of the United States and Virginia Constitutions. 277 Va. at 439, 674 S.E.2d at 852. Due process requires that a statute be sufficiently precise and definite to give fair warning to those who are subject to it what the statute prohibits and what is expected of them by the state.

Id. "The constitutional prohibition against vagueness also protects citizens from the arbitrary and discrimmatory enforcement of laws." *Id.*

Thus, there are two, independent ways in which a statute can be impermissibly vague. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000); see *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Greenville Women's Clinic v. S.C. Dep't of Health*, 317 F.3d 357, 366 (4th Cir. 2002). A vague statute violates the "important values" of fair notice to citizens and the prevention of arbitrary enforcement. *Hoffman*, 455 U.S. at 498.

"[A]n ordinance that lacks meticulous specificity nevertheless may survive a vagueness challenge if the ordinance as a whole makes clear what is prohibited." *Tanner*, 277 Va. at 439, 674 S.E.2d at 852. "Because legislative bodies are '[c]ondemned to the use of words,' courts cannot require 'mathematical certainty' in the drafting of legislation." *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). Accordingly, a statute may survive a vagueness challenge if the language used by the legislature makes clear what the statute prohibits and what is required in order to comply with the law. *Id.*

Volkswagen contends that the language of Code § 46.2-1569(7) as applied by the Commissioner

in this case is impermissibly vague because neither the statute nor any formal or informal administrative action provided Volkswagen with fair notice that it was prohibited from failing to deliver at least one vehicle of any model requested by a franchise dealer in any given month based solely on a mathematical determination that the number of vehicles it imported during that month equaled or exceeded the total number of its dealers eligible to make such a request. In the absence of any clear guidance within the statute or through regulation or guidance provided by the Commissioner, Volkswagen contends that the determination of compliance with the statute in any given case would depend solely on an arbitrary determination by the Commissioner of what is "equitable" after the fact.

Volkswagen notes that Code § 46.2-203 empowers the Commissioner to adopt "reasonable administrative regulations necessary to carry out the laws administered by the [DMV]," but that no regulations have been promulgated by the Commissioner to provide guidance to manufacturers and distributors as to the proper determination of the equitable relationship between total production and importation and the right of an individual dealer to request delivery of a specific make and model of a vehicle. Nor has the Commissioner provided any "guidance documents" on the application of the statute as permitted under Code § 2.2-4001 *et seq.*

On the specific facts of this case, Volkswagen contends that nothing in Code § 46.2-1569(7), as interpreted by the Commissioner, provides a manufacturer or distributor with notice that it was

prohibited from failing to supply every dealer who requested delivery of a particular newly introduced model of a vehicle with at least one vehicle in any month that the national production or importation of that model equaled or exceeded the total number of dealers requesting delivery of one or more vehicles, without regard to any other factor. Noting that the Commissioner expressly limited this finding to newly introduced models, declining to express any opinion on how the statute would apply "where there is reliable data regarding sales histories for particular vehicles," Volkswagen contends that the Commissioner created an arbitrary standard for the "equitable" delivery of new vehicle models that could not have been gleaned from the language of the statute and, thus, Volkswagen was without notice that its failure to supply Miller Auto with a least one of each of the requested vehicles in any given month would render it in violation of Code § 46.2-1569(7).

There is nothing inherently vague in a statutory requirement that an act be performed "equitably." Indeed, such a standard has been enacted by the General Assembly to address a variety of circumstances in order to effectively accomplish the purpose of a particular statute.[3]

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[3] See, e.g., Code § 2.2-219(D) (directing the Secretary of Natural Resources to "equitably allocate" credits for nutrient reductions in water quality control plans); Code § 2.2-4605(A)(1)(d) (requiring the Treasury Board to equitably apportion gains and losses among participants in local government investment pools); Code § 15.2-1636.19 (empowering the Compensation Board to equitably determine disputes concerning compensation of deputies and allocation of funds arising from a change in constitutional officers); Code § 19.2-386.14(C) (permitting the Criminal Justice Services Board to equitably

And, as the Commissioner correctly asserts on brief in this appeal, we have recognized that "a statute is not fatally indefinite because questions may arise as to its applicability, or opinions may differ with respect to what falls within its terms, or because it is difficult to enforce." *Fallon Florist, Inc. v. City of Roanoke*, 190 Va. 564, 590, 58 S.E.2d 316, 329 (1950).

Nonetheless, we agree with Volkswagen that, as applied by the Commissioner in this case, the requirement of Code § 46.2-1569(7) that Miller Auto was to receive delivery of 1998 Passats and New Beetles in a volume "equitably related to the total new vehicle production or importation currently being achieved nationally" is impermissibly vague. Neither the statute nor any administrative regulation or guidance promulgated by the Commissioner provided Volkswagen with notice that if the number of vehicles available in a given month was equal to or greater than the number of dealers making requests, it was prohibited from failing to deliver to Miller Auto at least one of each model of vehicle requested without regard to any other factors that might impact the determination of the number of vehicles the dealer would otherwise be entitled to receive.

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distribute forfeited property to eligible participating agencies); Code § 20-49.8(A) (permitting a court to equitably apportion unpaid expenses of a paternity proceeding); Code § 23-30.42(j) (authorizing the Virginia College Building Authority to equitably apportion expenses for its operation among participating institutions); Code § 32.1-299(A)(2) (requiring distribution of cadavers donated for scientific study equitably among health education institutions).

A statute, ordinance, or regulation which delegates discretionary authority to an administrative officer to determine its application does not satisfy due process if it lacks standards which are sufficiently clear to guide the officer, and inform those subject to his jurisdiction, of how that discretion is to be exercised. *See, e.g., Chapel v. Commonwealth*, 197 Va. 406, 415, 89 S.E.2d 337, 343 (1955); *cf. City of Waynesboro v. Keiser*, 213 Va. 229, 233-34, 191 S.E.2d 196, 199 (1972) (holding that a statute permitting a court to adjust property tax assessments "in its discretion" was "vague and overbroad [because it] provides no guidelines or standards for decision"). In *Chapel*, we held that the Dry Cleaners Act impermissibly delegated discretionary authority to the State Dry Cleaners Board "without fixing any standard or test to guide and control the exercise of such discretion." 197 Va. at 415, 89 S.E.2d at 343. As we said in *Chapel*:

> "It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience or in effect nullified for the sake of expediency. It is the prerogative and function of the legislative branch of the government, whether State or municipal, to determine and declare what the law shall be, and the legislative branch of the government may not divest itself of

> this function or delegate it to executive or administrative officers."

197 Va. at 410, 89 S.E.2d at 340 (quoting *Thompson v. Smith*, 155 Va. 367, 379, 154 S.E. 579, 584 (1930)).

We have recognized that the legislature may delegate discretion to an administrative officer to determine the specifics of how a statute is to be enforced, but " '[t]he legislature must declare the policy of the law and fix the legal principles which are to control in given cases.' " *Thompson*, 155 Va. at 381, 154 S.E. at 584 (quoting *Mutual Film Corp. v. Ohio Industrial Commission*, 236 U.S. 230, 239 (1915)). Of course, the legislature is not required to delve into the minutiae of the standards to be applied in every case, but may delegate to the administrative body rulemaking authority to set specific procedures for applying the general standards established by the laws the body is charged with enforcing "so long as the rules it adopts are not inconsistent with the authority of the statutes that govern it or with principles of due process." *Judicial Inquiry & Review Commission v. Elliott*, 272 Va. 97, 115, 630 S.E.2d 485, 494 (2006); see also *Sargent Elec. Co. v. Woodall*, 228 Va. 419, 424, 323 S.E.2d 102, 105 (1984). In short, the requirement of fair notice contained in due process is not satisfied if the public cannot determine what the law prohibits or the standard to which they must conform from either the language of the statute or a properly promulgated regulation or other official guidance provided prior to the statute being enforced, but rather only after the fact from the result of an arbitrary exercise of discretion by the

administrative official charged with enforcing the statute.

In this case, the Commissioner stated that he used "basic mathematics to analyze whether an allocation of zero vehicles would satisfy the statutory requirement" to "equitably" allocate newly introduced models of vehicles to determine whether a manufacturer or distributor is in compliance with the provisions of Code § 46.2-1569(7). As an example, the Commissioner noted "that in December of 1997, for instance, sufficient numbers of Passats were imported into the U.S. to allow each U.S. dealer to receive allocations or shipments of approximately 8 Passats." The Commissioner concluded that the this "[s]imple division" supported his conclusion that Code § 46.2-1569(7) prohibited Volkswagen from failing to ship at least one Passat to Miller Auto from that month's importations.

However, the issue before this Court is not whether "simple mathematics" demonstrates that Volkswagen could have shipped at least one of each model to Miller Auto, but rather whether Code § 46.2-1569(7) provided Volkswagen with adequate notice that the statute prohibited Volkswagen from failing to ship at least one of each model to Miller Auto if it were otherwise capable of doing so. When viewed in this light, the Commissioner's use of "basic mathematics" is clearly not a standard that is prescribed by the language of the statute. Nor is it a standard clearly enunciated in a regulation or other form of guidance promulgated by the Commissioner. Accordingly, under the facts of this case, we conclude that during the period of October 1997 through

March 1998 Volkswagen could not reasonably have understood from the language of the statute that its failure to ship any newly introduced Passats and New Beetles to Miller Auto would violate Code § 46.2-1569(7), but learned this only after the fact from the result of an arbitrary exercise of discretion by the administrative official charged with enforcing the statute.

In the absence of fair notice from the language of the statute or that the Commissioner would interpret the statute as prohibiting it from not shipping at least one of each requested vehicle model to Miller Auto in any month that it was capable of doing so, Volkswagen was denied its right to due process. Thus, we hold that Code § 46.2-1569(7) is impermissibly vague as applied in this case, and the Commissioner's finding that Volkswagen was in violation of that statute must be set aside.

As in *Volkswagen II*, we conclude that because the merits of Volkswagen's appeal can be decided on the narrower basis of an "as applied" challenge to the statute under due process, it is not necessary to consider Volkswagen's facial challenge to the statute based on either vagueness or dormant Commerce Clause principles. 266 Va. at 454, 587 S.E.2d at 532. Therefore, we again will vacate that portion of the Court of Appeals' judgment holding that Code § 46.2-1569(7) does not violate the Commerce Clause of the United States Constitution. *See id.*

CONCLUSION

For these reasons, we will vacate that portion of the Court of Appeals' judgment addressing the Commerce Clause issue, reverse the judgment of the Court of Appeals affirming the Commissioner's finding that Volkswagen violated Code § 46.2-1569(7), and enter final judgment here for Volkswagen.

Reversed in part,

vacated in part,

and final judgment.

JUSTICE KINSER, with whom JUSTICE LEMONS and SENIOR JUSTICE RUSSELL join, dissenting.

Today, the majority holds that "Code § 46.2-1569(7) [(the Statute)] is impermissibly vague as applied in this case." That holding, in my view, is based on a flawed analysis that flows from the majority's asking the wrong question. The majority repeatedly inquires whether the Statute, or any administrative regulation or guidance promulgated by the Commissioner of the Virginia Department of Motor Vehicles (Commissioner), provided Volkswagen of America, Inc. (Volkswagen) with notice that if the number of vehicles available in a given month was equal to or greater than the number of dealers making requests, it was prohibited from failing to deliver to Miller Auto at least one of each model of vehicle requested without regard to any other factors that might impact the determination of the number of vehicles the dealer would otherwise be entitled to receive.

The appropriate question for an as-applied analysis, however, is whether the provisions of Code § 46.2-1569(7) gave Volkswagen fair warning that shipping zero Passats and zero New Beetles to Miller Auto Sales, Inc. (Miller Auto) during the period in question was not "equitably related" to the 18,454 Passats and the 5,637 New Beetles Volkswagen imported for distribution among 600 franchise dealers. Code § 46.2-1569(7). Focusing on whether Volkswagen was "otherwise capable of" shipping at least one Passat and one New Beetle to Miller Auto during the months in question, the majority purports

to conduct an as-applied analysis; however, it fails to do so because it never examines the Statute in light of the facts of this case. By asking the wrong question, the majority, in my view, reaches the wrong answer. Thus, I respectfully dissent.[1]

I. VAGUENESS CHALLENGE

As this Court has stated, "duly enacted laws are presumed to be constitutional" and "any reasonable doubt concerning the constitutionality of a law" should be resolved "in favor of its validity." *Tanner v. City of Virginia Beach*, 277 Va. 432, 438, 674 S.E.2d 848, 852 (2009). There is even greater deference for duly enacted economic regulations, which are subject to "a less strict vagueness test because [their] subject matter is often more narrow, and because businesses . . . can be expected to consult relevant legislation in advance of action." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). In addition, "the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.* There is also a "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498-99. For these reasons, a due process vagueness challenge to an economic

[1] Unlike the majority, I must address not only Volkswagen's claim that the Statute is impermissibly vague under the Due Process Clause but also its assertion that the Statute violates the dormant Commerce Clause. I will address the issues in that order.

regulation is " 'examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.' " *Motley v. Virginia State Bar*, 260 Va. 243, 247, 536 S.E.2d 97, 99 (2000) (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)).

In *Hoffman*, the Supreme Court of the United States explained:

> "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." . . . [T]o sustain such a challenge, the complainant must prove that the enactment is vague "'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all.' Such a provision simply has no core."

Hoffman, 455 U.S. at 495 n.7 (quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974); *Smith v. Goguen*, 415 U.S. 566, 578 (1974)) (internal citations omitted).

There are two independent ways in which a statute may be impermissibly vague. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000); accord *Hoffman*, 455 U.S. at 498; *Greenville Women's Clinic v. Commissioner, South Carolina*

Dep't of Health, 317 F.3d 357, 366 (4th Cir. 2002) (quoting *Hill*, 530 U.S. at 732).[2] Thus, a vague statute violates the "important values" of fair notice to citizens and the prevention of arbitrary enforcement. *Hoffman*, 455 U.S. at 498.

"[A]n ordinance that lacks meticulous specificity nevertheless may survive a vagueness challenge if the ordinance as a whole makes clear what is prohibited." *Tanner*, 277 Va. at 439, 674 S.E.2d at 852; *see also Hoffman*, 455 U.S. at 503 (determining whether a "business regulation" afforded "fair warning of what is proscribed"); *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 509 (5th Cir. 2001) ("Ford knew . . . it was prohibited from selling automobiles and it had fair notice that its conduct may violate [the statute.]"); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 757-58 (9th Cir. 1985) ("[V]agueness analysis still applies to [economic] regulation [and 't[he principal inquiry is whether the law affords fair warning of what is proscribed.' ") (citation omitted); *United States v. Sun & Sand Imp., Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984) (stating that a statute dealing with economic activity is vague if "it gives no warning to the challenger that his conduct is prohibited"); *Trans Union Corp. v. Federal Trade Comm'n*, 245 F.3d 809, 817 (D.C. Cir. 2001) (same); *Irvine v. 233 Skydeck*,

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[2] This standard for judging vagueness applies irrespective of the type of enactment being challenged. Compare Hill, 530 U.S. at 732 (applying the test of fair warning and arbitrary enforcement to a speech regulation) with Hoffman, 455 U.S. at498 (applying the same test to an "economic regulation," though "less strictly").

LLC, 597 F. Supp. 2d 799, 802 (N.D. Ill. 2009) (same); *Secretary, Vermont Agency of Natural Res. v. Irish*, 738 A.2d 571, 575-76 (Vt. 1999) (same).

In asking whether the Statute gave fair notice to Volkswagen as to what conduct was prohibited, the majority purports to conduct an as-applied analysis. But, in my view, the majority actually fails to examine the Statute " 'in light of the facts of the case at hand.' " *Motley*, 260 Va. at 247 (quoting *Maynard*, 486 U.S. at 361). Because both vehicles at issue in this case were newly introduced models, meaning no dealer and/or national sales data was available for either vehicle, there are two determinative questions in judging the Statute on an as-applied basis as to whether it gave Volkswagen fair notice of what conduct was prohibited. The majority never answers these questions. Did the Statute give fair warning that shipping zero vehicles to Miller Auto was not equitably related to the 18,454 Passats and 5,637 New Beetles Volkswagen imported for distribution to 600 dealers such that Volkswagen's conduct was prohibited? And, as applied in this case, did the Statute authorize arbitrary or discriminatory enforcement by the Commissioner?

The question is not whether Volkswagen knew it was prohibited from sending Miller zero Passats and zero New Beetles simply because it had imported enough to send each of its dealers at least one of both models. If Volkswagen's conduct in sending zero vehicles in the limited circumstances before the Court was " 'clearly proscribed[, it] cannot complain of the vagueness of the law as applied to

the conduct of others.' " *Shivace v. Commonwealth*, 270 Va. 112, 125, 613 S.E.2d 570, 577 (2005) (quoting *Commonwealth v. Hicks*, 267 Va. 573, 580-81, 596 S.E.2d 74, 78 (2004)); see *United States v. Raines*, 362 U.S. 17, 21 (1960).[3] Volkswagen must show that, as applied to the facts of this case, the Statute specified " 'no standard of conduct . . . at all.' " *Hoffman*, 455 U.S. at 495 n.7 (quoting *Goguen*, 415 U.S. at 578).

Although there are few facts in this case relevant to whether Code § 46.2-1569(7) is vague as applied, three facts are decisive to the vagueness challenge before us: the number of 1998 Passats and New Beetles Volkswagen imported nationally during the months at issue, the number of such vehicles shipped to Miller Auto during the relevant period, and the number of Volkswagen dealers in the United States at that time. From October 1997 to March 1998, Volkswagen imported 18,454 Passats and gave Miller Auto zero. In February and March 1998, Volkswagen imported 5,637 New Beetles and sent Miller Auto zero. Volkswagen had 600 franchise dealers in the United States during that time frame.

Although the majority mentions these facts, it does not actually incorporate them into its purported as-applied analysis. By repeatedly focusing on whether the Statute gave notice to Volkswagen that it was prohibited from failing to ship at least one

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[3] For these reasons, the multiple hypotheticals that Volkswagen presents in its brief are immaterial to the question at hand. See *Shivace*, 270 Va. at 125, 613 S.E.2d at 577 (noting that a court should examine a complainant's conduct before analyzing hypothetical applications of the law at issue).

vehicle of each model to Miller Auto "if it were otherwise capable of doing so" or "without regard to any other factors," the majority uses a legal test that the Statute does not contain. For the majority to apply that test, it constructs a hypothetical situation instead of examining the actual facts of this case. The majority's hypothetical, unlike the facts in this case, considers only whether Volkswagen imported enough Passats and New Beetles during the relevant months to give its 600 dealers at least one vehicle of each model. Given the number of Passats and New Beetles imported during the period in question, Volkswagen was clearly "otherwise capable of" shipping one Passat and one Beetle to each of the 600 dealers. But, such is not the appropriate question under the terms of the Statute.

> The Statute, in relevant part, states:
> Notwithstanding the terms of any franchise agreement, it shall be unlawful for any manufacturer [or] distributor [t]o fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series and model equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise.

Code § 46.2-1569(7). Pursuant to the statutory terms, Volkswagen was thus required to ship, if

ordered, the number of 1998 Passats and New Beetles needed by Miller Auto to receive a percentage of new vehicle sales of such vehicles that was "equitably related" to the total number of 1998 Passats and New Beetles that Volkswagen imported nationally.

"Equitable" means "fair to all concerned . . . : without prejudice, favor, or rigor entailing undue hardship." Webster's Third New International Dictionary 769 (1993). The requirement to do something "equitably" "simply directs and requires that [the required act be done] in such manner as will be just to the parties concerned, under all of the circumstances of the particular case." *Painter v. Painter*, 320 A.2d 484, 490 (N.J. 1974). The notion of equity is one "understood by lawyer and litigant alike." *Id.*

General principles of fairness and reasonableness are common in legislation, including legislation regarding vehicle allocation systems. See, e.g., Fla. Stat. Ann. § 320.64(18)-(19) (forbidding allocation system that is "unfair, inequitable, [or] unreasonably discriminatory . . . after considering the equities"); Md. Code Ann., Transp. § 15-208(a),(c) (allocation must be "in reasonable quantities and within a reasonable time"); Mass. Gen. Laws ch. 93B, § 4(e)(3) (same); Mich. Comp. Laws § 445.1574(1)(c) (same); Ohio Rev. Code Ann. § 4517.59(F) (franchisor cannot "unfairly change or amend" allotment of vehicles); Okla. Stat. Tit. 47, § 565(A)(9)(c) (manufacturer must not "unreasonably fail[] or refuse[] to offer" vehicles to dealers); S.C. Stat. § 56-15-40 (3)(a) (allocation must be "in

reasonable quantities and within a reasonable time"); Utah Code Ann. § 13-14-201(1)(i) (allocation system must be "fair, reasonable, and equitable"); Wash. Rev. Code § 46.96.185(1)(e) (allocation must be "in reasonable quantities and within a reasonable time").

As the majority concedes, "[t]here is nothing inherently vague in a statutory requirement that an act be performed 'equitably.' "[4] Volkswagen, however, maintains, and the majority essentially agrees, that the legality of a manufacturer's or distributor's conduct "hinges solely and completely on one's view of what is 'equitable.'" In criticizing the Commissioner for using "basic mathematics" to determine whether Volkswagen's allocation of zero Passats and zero New Beetles to Miller Auto was

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[4] Indeed, the General Assembly has incorporated an equitable standard in a variety of statutes. See, e.g., Code § 10.1-707(A)(iii) (requiring the Board of Conservation and Recreation to "determine the equitable allocation of funds among participating localities"); Code § 2.2-702(3) (requiring the Department for the Aging to "assure the equitable statewide distribution of [programmatic] resources"); Code § 2.2-2618(7) (empowering the Commonwealth Attorneys Services Council to "establish an equitable distribution plan for the allocation of any funds from public or private sources"); Code § 22.1-147 (directing the Board of Education to "provide for an equitable distribution" of certain funds); Code § 32.1-299(A)(2) (requiring the State Health Commissioner to distribute cadavers "equitably to the several colleges and schools of this Commonwealth"). While the majority recognizes the presence of the term "equitable" or "equitably" in various statutes, it fails to explain why the term is unconstitutionally vague as used in Code § 46.2-1569(7) but not elsewhere. Without such an explanation, these and other such statutes will likely be challenged for vagueness under the Due Process Clause.

"equitably related" to the number of such vehicles imported nationally, the majority states that "the issue before this Court is not whether 'simple mathematics' demonstrates that Volkswagen could have shipped at least one of each model to Miller Auto." I agree with that statement; the issue is clearly not whether Volkswagen "could have shipped in relation to" one Passat and one New Beetle to Miller Auto. (Emphasis added.) The Statute does not require a determination as to how many vehicles Volkswagen could have shipped. Instead, Code § 46.2-1569(7) requires the consideration of what allocation of new vehicles is equitable in the number of produced or imported vehicles nationally.

Using this statutorily required mathematical ratio, an as-applied analysis of whether the Statute is impermissibly vague hinges on the number of vehicles produced or imported in a given case vis-à-vis the number of dealers nationally. For example, determining whether shipping zero vehicles of a particular model was an equitable allotment of that model if Volkswagen had imported only 700 of such vehicles would be more difficult if 600 dealers ordered the particular vehicle. But, the meaning of "equitabl[e]" is much clearer where, as in this case, a manufacturer imported many thousands more vehicles of a particular model than it has dealers. Similarly, it would be a different case entirely if Volkswagen had provided any 1998 Passats and New Beetles to Miller Auto and the question was whether that number was equitably related to the number imported nationally. But, in this case, where Volkswagen had 600 dealers and imported over 18,000 vehicles of one model and over 5,000 of

another, it is obvious that zero is not equitably related to the "total new vehicle . . . importation . . . nationally" of such models. Sending zero of 18,454, and sending zero of 5,637 is not "fair" or "without prejudice [or] favor." Thus, "as a whole," the Statute "[made] clear what [was] prohibited" in light of the facts of this case. *Tanner*, 277 Va. at 439, 674 S.E.2d at 852. After conceding that "[t]here is nothing inherently vague in a statutory requirement that an act be performed equitably," the majority does not explain why this Statute and its specific requirement that two numbers be "equitably related" is impermissibly vague.

For the same reasons that the Statute makes clear what was prohibited in this case, it also satisfies the second aspect of the vagueness test: it does not authorize or encourage discriminatory or arbitrary enforcement. During the relevant months, Volkswagen imported several thousand more 1998 Passats and New Beetles than it had dealers and elected to send Miller Auto none of those vehicles. Under such circumstances, the Commissioner's decision to enforce the Statute was not arbitrary or discriminatory. Since Volkswagen is presumed to know the law, *Magruder v. Commonwealth*, 275 Va. 283, 304, 657 S.E.2d 113, 124 (2008), and certainly knew the number of Passats and New Beetles it had imported, its argument that the Commissioner's enforcement of the Statute was arbitrary is without merit. In addition, because Volkswagen's conduct was clearly proscribed by the Statute, it cannot complain of discriminatory enforcement in regard to the conduct of others. See *Hoffman*, 455 U.S. at 495; *Shivaee*, 270 Va. at 125, 613 S.E.2d at 577.

The majority, however, cites *Chapel v. Commonwealth*, 197 Va. 406, 89 S.E.2d 337 (1955), and *City of Waynesboro v. Keiser*, 213 Va. 229, 191 S.E.2d 196 (1972), in support of its conclusion that the Statute gives the Commissioner too much discretionary enforcement authority. In my view, those cases are not dispositive; neither actually involved a due process vagueness challenge and both cases pre-dated the *Hoffman* decision, which made clear that an individual "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." 455 U.S. at 495.

Despite that admonition, the majority, departing from an as-applied analysis, concludes:

> [T]he requirement of fair notice contained in due process is not satisfied if the public cannot determine what the law prohibits or the standard to which they must conform from either the language of the statute or a properly promulgated regulation or other official guidance provided prior to the statute being enforced, but rather only after the fact from the result of an arbitrary exercise of discretion by the administrative official charged with enforcing the statute.

While that conclusion may be a correct statement of law generally, whether the "public" can

determine the standard is not the question we must answer in this appeal. Instead, the question is whether Volkswagen, on the facts before us, had fair notice of what conduct was prohibited. It did, and the Commissioner did not act arbitrarily in applying the Statute to that conduct.

Nonetheless, Volkswagen argues, and the majority agrees, that a manufacturer or distributor cannot comply with the requirements of Code § 46.2-1569(7) without guidance in the form of regulations.[5] Without such regulations, Volkswagen maintains, manufacturers and distributors are left with the Statute alone, which does not address the multiple factors that affect a decision regarding the allotment of new vehicles of each make, series, and model. But, it is precisely because there are many factors affecting an allotment decision that the General Assembly opted for "'flexibility and reasonable breadth, rather than meticulous specificity'" that would come with attempting to list every factor to consider. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (quoting *Esteban v. Central Missouri State Coll.*, 415 F.2d 1077, 1088 (8th Cir. 1969)). The Statute is "not fatally indefinite because questions may arise as to its applicability, or opinions may differ with respect to what falls within its terms, or because it is difficult to enforce." *Fallon Florist, Inc. v. City of Roanoke*, 190 Va. 564, 590, 58 S.E.2d 316, 329 (1950). Volkswagen simply cannot argue that Code § 46.2-1569(7) specifies " 'no standard of conduct . . . at all' " when viewed in light

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[5] Code § 46.2-203 authorizes the Commissioner to "adopt reasonable administrative regulations necessary to carry out the laws administered by the Department [of Motor Vehicles]."

of the facts of this case.[6] *Hoffman*, 455 U.S. at 495 n.7 (quoting *Goguen*, 415 U.S. at 578).

Finally, I believe the majority does not consider the Commissioner's narrowing construction of the Statute. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, ___, 128 S.Ct. 1184, 1190 (2008) (noting importance of "accord[ing] a law a limiting construction to avoid constitutional questions"). The Commissioner stated in the August 1, 2005 hearing decision:

> By using basic mathematics to analyze whether an allocation of zero vehicles would satisfy the statutory requirement that a manufacturer ship to a dealer the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise, I find that such an allocation would generally not satisfy the statutory requirement in months where, as in this case, the national importation numbers exceed the number of dealers nationally, and particularly where, as in this case, the

[6] We should not assume that the Commissioner will not promulgate "administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations" of the statute. *Hoffman*, 455 U.S. at 501.

> vehicles are newly introduced makes, series or models. An allocation of zero vehicles, assuming a dealer has no such vehicles in inventory, translates to zero sales and zero sales, expressed as a percentage of new vehicle sales, would be zero percent. It is my opinion that shipping a number of vehicles that will enable a dealer to achieve or receive zero percent of the sales of a vehicle is generally not equitably related to national importation. I would note that I am limiting this finding, that a shipment of zero vehicles will not allow a dealer to achieve a percentage of vehicle sales equitably related to national importations, to *newly introduced* makes, series and models of vehicles, such as the Passats and Beetles in this case, where no meaningful history of dealer or national sales exist for the new vehicle. I decline to comment on whether this analysis or finding would stand in situations where there is reliable data regarding the sales histories for particular vehicles nationally and by individual dealers.

In conclusion, it remains unclear to me how the majority can conduct an as-applied analysis by focusing on whether Volkswagen was "otherwise capable of" shipping at least one Passat and one New Beetle to Miller Auto during the relevant months without considering the "total new vehicle . . . importation" of 1998 Passats and New Beetles

"achieved nationally" by Volkswagen in relation to the number of dealers and without asking, based on those numbers, whether the Statute gave Volkswagen fair notice that failing to ship any such vehicles to Miller Auto was proscribed. Code § 46.2-1569(7). In essence, the majority rewrites the Statute it analyzes. It ignores the mathematical equitable relationship required by the terms of Code § 46.2-1569(7), and instead constructs its own legal test and then applies that test to a hypothetical situation.[7]

For these reasons, I conclude Code § 46.2-1569(7), as applied to the facts of this case, is not impermissibly vague under the Due Process Clause.

II. COMMERCE CLAUSE CHALLENGE

Having concluded that the Statute is not impermissibly vague as applied, I now turn to Volkswagen's remaining assignment of error: that the Court of Appeals erred by failing to hold that Code § 46.2-1569(7) "violates the dormant Commerce Clause of the United States Constitution."

The power vested in the Congress of the United States to regulate interstate commerce, see U.S. Const. art. I, § 8, cl. 3, has long been understood to restrict, but not entirely remove, the States' power "to make laws governing matters of local concern which nevertheless in some measure affect

[7] While the majority does not rely on it for its conclusion, Volkswagen argues that Miller Auto's failure to obtain repair equipment for the 1998 Passats was a relevant factor in determining the Statute's validity. That factor, if relevant, does not alter my conclusion given the facts of this case.

interstate commerce or even, to some extent, regulate it." *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945) (*citing Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829)); *see also Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989) (noting the "Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres"). However, under "[t]he doctrine of the dormant Commerce Clause," [8] the States are prohibited "from engaging in economic protectionism," *Appalachian Voices v. State Corp. Comm'n*, 277 Va. 509, 517, 675 S.E.2d 458, 461 (2009), i.e., " 'regulatory measures designed to benefit in-state economic interests by burdening out of state competitors.' " *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (citation omitted). The dormant Commerce Clause thus prevents "state taxes and regulatory measures impeding free private trade in the national marketplace," *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980), and "protects

[8] The "dormant" or "negative" Commerce Clause is a "corollary rule" that has developed in the decisions of the United States Supreme Court. *Appalachian Voices v. State Corp. Comm'n*, 277 Va. 509, 516, 675 S.E.2d 458, 461 (2009). "Although the Constitution does not in terms limit the power of States to regulate commerce, [the Supreme Court of the United States has] long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007); *accord Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, ___, 128 S.Ct. 1801, 1808 (2008).

markets and participants in markets." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997).

The United States Supreme Court has constructed a "two-tiered approach" for evaluating whether a state economic regulation conforms to the Commerce Clause's negative command. *Healy*, 491 U.S. at 337 n.14. The first tier is known as the "discrimination tier," and the second tier is generally referred to as the "undue burden tier." *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005). Because "there is no clear line separating the category of state regulation" subject to the discrimination test and the category subject to the undue burden test, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986), a state statute must satisfy the conditions of both tiers of analysis to withstand scrutiny. *See C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); *Tracy*, 519 U.S. at 300 n.12. Under either tier, or test, the burden to show a violation of the dormant Commerce Clause rests on the party challenging the validity of a state statute. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Baude v. Heath*, 538 F.3d 608, 613 (7th Cir. 2008).

Under the discrimination test, a state statute is generally struck down "without further inquiry," when the "statute directly regulates or discriminates against interstate commerce,[] when its effect is to favor in-state economic interests over out-of-state interests," *Brown-Forman*, 476 U.S. at 579, or when "the practical effect of the regulation is to control conduct beyond the boundaries of the State," *Healy*, 491 U.S. at 336. The discrimination test, therefore,

applies a "virtually per se rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

However, a state statute that clearly discriminates against interstate commerce will not be struck down if the discrimination is "'demonstrably justified by a valid factor unrelated to economic protectionism.'" *Wyoming*, 502 U.S. at 454. In other words,

> once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)); *accord Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, ___, 128 S.Ct. 1801, 1808 (2008). And, the "practical effect" of the challenged statute must not be considered in isolation but in conjunction "with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336. "[T]he Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* at 336-37. The prohibition against discrimination applies even

where only a minimal portion of interstate commerce is discriminated against: "The volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." *Wyoming*, 502 U.S. at 455.

If a statute is found not to discriminate either on its face or in its practical effect, it must then be examined under the second tier, the "undue burden" test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree[;] the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (internal citation omitted). A court must defer to the state legislative body when evaluating whether a statute has " 'a legitimate local purpose' " and " 'putative local benefits,' " but must more closely examine the statute's burdens. *Yamaha*, 401

F.3d at 569 (quoting *Pike*, 397 U.S. at 142). "State laws frequently survive this Pike scrutiny." *Davis*, 553 U.S. at ___, 128 S.Ct. at 1808.

Volkswagen does not contend that the Statute either facially discriminates against interstate commerce or favors in-state economic interests over out-of-state interests. Instead, Volkswagen asserts that the Statute is per se invalid because it has the practical effect of controlling commercial conduct outside the Commonwealth, and if other States adopted similar legislation, "commercial gridlock" would result. Alternatively, Volkswagen contends the Statute unduly burdens interstate commerce under the *Pike* test.

Volkswagen argues that the Statute requires an automobile manufacturer or distributor to compare the number of vehicles shipped into Virginia with the number of vehicles imported nationally and that a distributor would violate the Statute if it decreased the number of vehicles shipped to Virginia without making similar changes nationally. In Volkswagen's words: "[I]f the distributor desires to decrease the number of vehicles that it ships to its Virginia dealers, then it must decrease the number of vehicles that it imports nationally and, correspondingly, the number of vehicles that it ships to dealers located both in Virginia and in other states." Volkswagen maintains that, because the number of vehicles it imports into the United States annually is a fixed resource, complying with the Statute has the "practical effect" of forcing Volkswagen to "alter its conduct in other states . . . to comply with the [Statute] by shipping

vehicles to Virginia dealers that otherwise would have gone to dealers in other states."

Contrary to Volkswagen's argument, the Statute does not require that Virginia dealers collectively receive a percentage of new vehicles "equitably related to the total new vehicle[s]" imported nationally. Instead, the Statute only requires that each individual dealer be allocated sufficient "new vehicles of each make, series and model needed by the dealer to receive a percentage of total new vehicle sales . . . equitably related to" the total new vehicles of such make, series and model imported nationally. Therefore, Volkswagen's claim that there must necessarily be a redistribution of vehicles across state lines to satisfy Code § 46.2-1569(7) does not follow.

As the majority explains, Miller Auto, like the approximately 600 Volkswagen franchise dealers in the United States during the relevant period, obtained its stock of 1998 Passat and New Beetle vehicles, which were manufactured abroad, on the basis of Volkswagen's national allocation system. That system used a mathematical algorithm designed to determine where particular vehicles were most needed and most likely to be sold to the public. Miller Auto was located in a sales area that included Volkswagen dealers in Northern Virginia, Maryland, and the District of Columbia.[9] Seventeen Volkswagen dealers operated throughout Virginia

[9] During the relevant time, Miller Auto's sales area included six other Volkswagen dealers in Northern Virginia, four in Maryland, and one in the District of Columbia.

during the period in question. *Volkswagen of America, Inc. v. Smit*, 266 Va. 444, 447, 587 S.E.2d 526, 528 (2003). At that time, a dealer could not place an order for a particular vehicle but received new vehicles solely pursuant to the allocation system. An area executive had discretion to adjust the algorithm's results for each dealer located within his/her particular geographic sales area depending on several factors, including local market conditions, the reported inventories of all dealers within the area, and the minimum stocking requirements of a dealer's franchise agreement.

While the foregoing evidence suggests that allocations conceivably could be made across state lines, the evidence does not demonstrate, however, that Virginia's "equitable relation" requirement did or will require Volkswagen to adjust either its nationwide allocation of new vehicles to the regional sales area that includes Virginia dealers, or its area-wide allocation of automobiles within that sales area to the detriment of dealers in Maryland and the District of Columbia. The requirements of Code § 46.2-1569(7) do not direct the particulars of any manufacturer or distributor's vehicle allocation methodology. As the Court of Appeals noted, "[n]othing in the [S]tatute . . . ties the number of vehicles allocated to dealers in Virginia to the number of vehicles allocated to dealers in other states[; n]or does the [S]tatute otherwise regulate the number of vehicles a distributor may allocate in any other state." *Volkswagen of America, Inc. v. Smit*, 52 Va. App. 751, 791, 667 S.E.2d 817, 837 (2008). Instead, the Statute only prohibits the failure to allocate sufficient vehicles "needed by the dealer

to receive a percentage of total new vehicle sales . . . equitably related" to the total new vehicles imported nationally. Code § 46.2-1569(7). Volkswagen presented no evidence to support its assertion that the Statute "mandat[es] that Volkswagen, and all other manufacturers design their systems of allocating vehicles among their dealers nationwide . . . to accommodate Virginia law."

Moreover, Volkswagen did not prove that it and/or other distributors could not reallocate vehicles among Virginia dealers to comply with the Statute instead of reallocating across state lines, in this case, among Volkswagen dealers in Virginia, whether located in Miller Auto's sales area or another sales area in Virginia. Based on the record before the Court in this appeal, these two alternatives, intrastate or interstate reallocation, are equally probable, meaning Volkswagen failed to carry its burden to demonstrate that the Statute discriminates against interstate commerce. See *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 37 (1st Cir. 2007) ("[T]he mere fact that a statutory regime [may have] discriminatory potential is not enough to trigger strict scrutiny under the dormant commerce clause."); *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir. 2009) ("[T]he party claiming discrimination has the burden to put on evidence of a discriminatory effect on commerce that is 'significantly probative, not merely colorable.' ") (quoting *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 40 (1st Cir. 2005)).

Without sufficient evidence to establish that the Statute necessarily requires interstate

reallocation of vehicles to Virginia dealers, I am compelled to conclude that Code § 46.2-1569(7) does not have "the practical effect of . . . control[ling] commercial] conduct beyond the boundaries of the State." Healy, 491 U.S. at 336. Furthermore, any regulation of intrastate allocation of vehicles that benefits and burdens solely intrastate dealers does not violate the dormant Commerce Clause.[10] *See Grant's Dairy-Maine, LLC v. Commissioner of Maine Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 22 (1st Cir. 2000) ("The dormant Commerce Clause does not protect intrastate competition, but . . . safeguards interstate markets from discriminatory regulation."). Likewise, without evidence that the Statute has the practical effect of controlling interstate commerce, I cannot guess as to "what effect would arise if not one, but many or every, State adopted similar legislation." Healy, 491 U.S. at 336.

Therefore, because Volkswagen had the burden to demonstrate that the Statute has the practical effect of controlling commercial conduct beyond the boundaries of Virginia and has not carried that burden, I reject Volkswagen's claim that the Statute violates the dormant Commerce Clause under the discrimination test. *Cf. American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n*, 545

[10] My conclusion should not be read as suggesting that proof of interstate reallocation of vehicles would result necessarily in a finding that the Statute violates the dormant Commerce Clause, but merely that a determination of discriminatory practical effect cannot be made on the record in this appeal.

U.S. 429, 434-37 (2005) (refusing to invalidate a tax challenged under the dormant Commerce Clause in part because the challenger failed to provide "convincing evidence showing that the tax deters, or for that matter discriminates against, interstate activities"); *Kleinsmith*, 571 F.3d at 1040-43 (rejecting a claim that a state statute has the practical effect of discriminating against interstate commerce because the party claiming discrimination failed to carry his burden of "put[ting] on evidence of a discriminatory effect . . . that is 'significantly probative, not merely colorable' " and "how the [statute had] alter[ed] the competitive balance between [in-state and out-of-state competitors]") (citation omitted); *Cherry Hill Vineyard*, 505 F.3d at 36 ("[A] plaintiff bringing a dormant commerce clause challenge based exclusively on the allegedly discriminatory effect of a statutory scheme is required to submit some probative evidence of adverse impact."); *Yamaha*, 401 F.3d at 563, 568-69 (holding that a Virginia statute allowing "any existing franchised dealer [of motorcycles] to protest the establishment of a new dealership for the same brand anywhere in the Commonwealth" did not have the effect of "discriminat[ing] against interstate commerce" because the challenging franchisor "did not produce any evidence" that the statute's "probable effect" would be the reallocation of motorcycles to Virginia dealers "to the detriment of out-of-state dealers").

I now turn to the "undue burden" tier of analysis. However, the noted failure of Volkswagen to demonstrate that the Statute actually burdens interstate commerce, as opposed to intrastate

commerce, prevents me from concluding that the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

> It is impossible to tell whether a burden on interstate commerce is "clearly excessive in relation to the putative local benefits" without understanding the magnitude of both burdens and benefits. Exact figures are not essential (no more than estimates may be possible) and the evidence need not be in the record if it is subject to judicial notice, but it takes more than lawyers' talk to condemn a statute under Pike. . . . [W]hoever wants to upset the law bears the[] burden[].

Baude, 538 F.3d at 612-13 (internal citations omitted).

My refusal to find an undue burden on interstate commerce is buttressed by the significance of the unchallenged, putative local benefits: the "promot[ion of] the interest of the retail buyers of motor vehicles and [the] prevent[ion of] unfair methods of competition and unfair or deceptive acts or practices." Code § 46.2-1501. Thus, I cannot conclude that the Statute unduly burdens interstate commerce. See *Kleinsmith*, 571 F.3d at 1043-44 (having concluded "in the prior section of this opinion" that the challenger "has failed to carry his burden of proving that the . . . statute is discriminatory in practical effect," "we must reject"

the dormant Commerce Clause challenge, as the challenger "has not produced evidence of any burden that the challenged law imposes on interstate commerce").

III. CONCLUSION

For these reasons, I would hold that Code § 46.2-1569(7) is not impermissibly vague as applied in the circumstances of this case, and, I would reject Volkswagen's challenge under the dormant Commerce Clause. Thus, I respectfully dissent and would affirm the judgment of the Court of Appeals.

COURT OF APPEALS OF VIRGINIA

Present: Judges Elder, Frank and Clements

Argued at Richmond, Virginia

VOLKSWAGEN OF AMERICA, INC.

v.

DEMERST B. SMIT, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES AND MILLER AUTO SALES, INC.

OPINION BY
JUDGE JEAN HARRISON CLEMENTS

OCTOBER 28, 2008

Record No. 2961-07-2

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
Melvin R. Hughes, Jr., Judge

This appeal arises from an order of the Circuit Court of the City of Richmond (circuit court) affirming the decision by Demerst B. Smit, Commissioner of the Virginia Department of Motor Vehicles (commissioner), that, during the period October 1997 through March 1998, Volkswagen of America, Inc. (Volkswagen) violated Code § 46.2-1569(7) when it failed to ship any newly introduced

Passats or New Beetles to Miller Auto Sales, Inc. (Miller). On appeal, Volkswagen contends the circuit court erred in affirming the commissioner's decision because (1) the commissioner failed to perform the requisite analysis under Code § 46.2-1569(7), (2) the record contains no evidence to support the commissioner's decision, (3) the commissioner failed to observe required procedures, (4) the statute violates the dormant Commerce Clause, and (5) the statute is unconstitutionally vague. For the reasons that follow, we affirm the circuit court's affirmance of the commissioner's decision.

I. BACKGROUND

Volkswagen, a New Jersey corporation, imports a fixed number of vehicles from its German parent corporation and distributes them to its approximately 600 dealers in the United States, including its 17 dealers in Virginia. Miller is a Volkswagen dealer located in Winchester. In January 1998, Miller was the smallest dealer by volume in its assigned sales district.[1]

In late 1997 and early 1998, Volkswagen began importing a number of new models of vehicles, including the 1998 Passat and the New Beetle, both of which were in short supply.[2] Volkswagen used a

[1] Miller sold 47 new Volkswagen vehicles in 1997. By comparison, the two largest dealers by volume in the same sales district, located in Springfield and Tysons Corner, respectively, both sold over 1,000 new Volkswagen vehicles in 1997.

[2] Although designated a 1998 model, the new, redesigned Passat was introduced in the fall of 1997. The New Beetle was introduced in February 1998. Both vehicles proved to be very

national allocation methodology to distribute those new models to its dealers. That methodology was based on a "mathematical algorithm" designed to distribute vehicles in short supply where they were most likely to be sold and where they were most needed because of low inventory. Volkswagen then adjusted the algorithm results for each dealer based on the dealer's customer satisfaction survey scores. Dealers, like Miller, that generally failed to achieve a certain level of customer satisfaction scores had their algorithm results reduced and received fewer vehicles as a result. Volkswagen also permitted its "area executives," who were responsible for allocating the new vehicles to the individual dealers, to modify the algorithm results in response to local market conditions. Additionally, Volkswagen utilized a "minimum stocking requirement," which allowed the area executives to override the algorithm results to ensure that each dealer had at least one vehicle of every Volkswagen model in its inventory.

In February 1998, Miller sent a letter to Volkswagen, with a copy to the commissioner, complaining that Volkswagen's allocation of vehicles to Miller violated Code § 46.2-1569(7).[3] Specifically,

popular, and Volkswagen's production of those vehicles could not keep up with the public's demand. Other older models of Volkswagen vehicles, including the earlier version of the Passat, were far less popular and widely available at the time.

[3] Code § 46.2-1569(7) provides:

> Notwithstanding the terms of any franchise agreement, it shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or their representatives:

Miller asserted that "allocating Volkswagens based on Customer Satisfaction Index" was contrary to the statute. Miller also requested that Volkswagen give Miller "the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicles production or importation currently being achieved nationally by each make, series, and model covered under the warranty."

After a failed attempt by the parties at mediation, the hearing officer conducted an evidentiary hearing to determine whether Volkswagen failed to provide Miller with "an equitable number of vehicles in short supply." Based on the evidence presented by the parties, the hearing officer found that Volkswagen's vehicle allocation methodology in effect since October 1997 did not conform to the provisions of Code § 46.2-1569(7)

* * * * * * * *

To fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise. Upon the written request of any dealer holding its sales or sales and service franchise, the manufacturer or distributor shall disclose to the dealer in writing the basis upon which new motor vehicles are allocated, scheduled, and delivered to the dealers of the same line-make. In the event that allocation is at issue in a request for a hearing, the dealer may demand the Commissioner to direct that the manufacturer or distributor provide to the dealer, within thirty days of such demand, all records of sales and all records of distribution of all motor vehicles to the same line-make dealers who compete with the dealer requesting the hearing.

because it unfairly penalized small-volume dealers like Miller. In reaching that decision, the hearing officer found that the algorithm Volkswagen used to allocate vehicles in short supply effectively prevented Miller from acquiring such vehicles because it "truncated fractional allocations" and "did not accumulate 'fractional vehicles.'" The hearing officer further found that the deficiencies in Volkswagen's algorithm were compounded by Volkswagen's use of customer satisfaction scores to adjust the algorithm results. That practice, the hearing officer found, inequitably punished Miller because "the restriction of allocations itself created a vicious cycle of lower [customer satisfaction] scores." The hearing officer also found that Volkswagen's "minimum stocking requirement" failed to overcome the inequities in the allocation methodology in this case, because it was applied only after Miller requested a hearing.

Adopting the hearing officer's findings, the commissioner concluded that the allocation methodology utilized by Volkswagen since October 1997 violated Code § 46.2-1569(7).

Volkswagen appealed to the circuit court, arguing that the commissioner erred in basing his determination whether Volkswagen was in compliance with Code § 46.2-1569(7) on the allocation methodology used by Volkswagen rather than on the actual number of vehicles Miller received from Volkswagen [Volkswagen allocated to Miller] in relation to the number of vehicles Volkswagen imported nationally. Volkswagen also argued that Code § 46.2-1569(7) is

unconstitutionally vague and violates the Commerce Clause of the United States Constitution.

Rejecting Volkswagen's arguments, the circuit court affirmed the commissioner's decision that Volkswagen's vehicle allocation methodology violated Code § 46.2-1569(7).

On appeal to this Court, we affirmed the circuit court's judgment, holding that Code § 46.2-1569(7) was neither unconstitutionally vague nor in violation of the Commerce Clause and that the commissioner's determination that Volkswagen's vehicle allocation methodology violated Code § 46.2-1569(7) was consistent with the plain meaning of the statute and supported by the record. See *Volkswagen of Am., Inc. v. Quillian*, 39 Va. App. 35, 55, 62, 64-65, 69, 569 S.E.2d 744, 754, 757-58, 759, 761 (2002), reversed in part and vacated in part sub nom. *Volkswagen of Am., Inc. v. Smit*, 266 Va. 444, 454, 587 S.E.2d 526, 532 (2003).

The Supreme Court of Virginia awarded Volkswagen an appeal and, by opinion dated October 31, 2003, reversed this Court's judgment that the commissioner properly based his determination that Volkswagen violated Code § 46.2-1569(7) on Volkswagen's vehicle allocation methodology rather than the specific number of vehicles Volkswagen allocated to Miller. *Volkswagen*, 266 Va. at 454, 587 S.E.2d at 532. The Court held that the "plain and unambiguous" language of Code § 46.2-1569(7)

> required the [c]ommissioner to consider the actual monthly shipments that

> Volkswagen made to Miller in relation to the number of new vehicles imported by Volkswagen on a national level in the particular vehicle categories covered under Miller's franchise agreement. The statute further required that the [c]ommissioner, in conducting this examination, determine whether Miller obtained the number of such vehicles needed to receive a percentage of new vehicle sales "equitably related" to the number of these types of vehicles imported by Volkswagen nationally.

Id at 452, 587 S.E.2d at 531.

The Supreme Court then concluded that the commissioner failed to undertake the required analysis:

> Instead of addressing the actual number of vehicles Miller received from Volkswagen in relation to national importation numbers, the [c]ommissioner merely examined the component parts of Volkswagen's vehicle allocation methodology, and adjustments made to that process, to determine whether they were "fair" in their application to small dealers such as Miller. Thus, in basing his determination on Volkswagen's vehicle allocation methodology, the [c]ommissioner wholly failed to consider

> the national importation numbers for the types of vehicles covered under Miller's franchise agreement. This omission was followed by the [c]ommissioner's failure to address whether Miller received the number of vehicles needed to receive a percentage of new vehicle sales "equitably related" to the quantity of these types of vehicles imported on a national level.

Id. at 453, 587 S.E.2d at 531. Hence, the Court ruled that the commissioner's "determination must be set aside." *Id.* at 453, 587 S.E.2d at 532.

The Supreme Court further ruled that, because its "conclusion regarding the [c]ommissioner's erroneous application of the statute decide[d] the merits of [the] appeal," it was unnecessary to "reach the constitutional issues raised by Volkswagen." *Id.* Accordingly, the Court vacated "that portion of [this Court's] judgment holding that Code § 46.2-1569(7) does not violate the Commerce Clause of the United States Constitution and is not unconstitutionally vague." *Id.*

Reiterating the need to focus "on the actual shipments to Miller, the relevant national importation figures, and whether there was an 'equitable' relationship between those numbers as mandated by the statute," rather than "on the business judgment of Volkswagen," the Supreme Court remanded the case to this Court "for ultimate remand to the [c]ommissioner for further proceedings consistent with the principles expressed

in [the Supreme Court's] opinion." *Id.* at 454, 587 S.E.2d at 532.

By order dated April 20, 2004, this Court withdrew its earlier opinion and remanded the case to the circuit court for ultimate remand to the commissioner.

On remand to the commissioner, Volkswagen moved to have Miller's February 1998 complaint dismissed for failure to state a valid claim because it focused solely on Volkswagen's allocation methodology rather than the actual number of new vehicles Miller had received.[4] Volkswagen also argued that "Miller's initial protest may be moot" because it was based on an allocation method that was no longer used by Volkswagen. Concluding that the case was in the "same posture" as when Miller was granted the original hearing except they "now [had] a clear indication from the Supreme Court on what [the commissioner was] required to consider in order to make a determination whether Volkswagen

[4] In its motion to dismiss, Volkswagen described the Virginia Supreme Court's ruling as follows:

> In its October 31, 2003 decision, the Virginia Supreme Court, among other things, held that [Code § 46.2-1569(7)] does not authorize review of the allocation methodology adopted by a vehicle distributor. According to the Virginia Supreme Court, all that the [s]tatute authorizes the [c]ommissioner to review is the actual vehicle shipments to a dealer to determine if those actual shipments provide a dealer (here Miller) with a percentage of vehicles "equitably related" to the number of vehicles imported by the distributor nationally.

[had] violated . . . Code § 46.2-1569(7)," the commissioner denied Volkswagen's motion to dismiss and directed that an evidentiary hearing be held.

The commissioner noted that, consistent with the Supreme Court's opinion and Code § 46.2-1569(7), the issue to be determined was "whether Miller obtained the number of vehicles needed to receive a percentage of new vehicle sales 'equitably related' to the quantity of these types of vehicles imported on a national level." Thus, the commissioner directed Volkswagen
to provide the hearing officer and Miller with all relevant information and data which would delineate (i) Volkswagen's national importation numbers for the types of vehicles covered under Miller's franchise agreement for the time period in dispute, and (ii) the actual shipments received by Miller in relation to the national importation numbers achieved by Volkswagen during this same time period.

When the hearing officer was appointed, Volkswagen requested that he "impose[] some process by which Miller's claims [could] be identified and articulated prior to the hearing." Specifically, Volkswagen asked that "Miller be required to provide Volkswagen with either some form of amended complaint or 'bill of particulars' outlining the specifics of its complaint."

After conducting a prehearing conference, the hearing officer noted that the parties agreed that "the period under consideration in this dispute [was] from 1993 through 1998" and that the issue to be

heard was the same issue articulated by the Supreme Court and the commissioner, namely, "whether Miller . . . received the number of vehicles needed [to] receive[] a percentage of new vehicles equitably related to the number of vehicles imported by Volkswagen nationally." The hearing officer further noted that Volkswagen's request for more specifics of Miller's complaint was "an ingenuous irrelevancy" since the issue was clear. The hearing officer asked the parties to "suggest corrections to [his] findings as appropriate."

In response, Volkswagen stated that it did not agree that the period under consideration was 1993 through 1998. Instead, Volkswagen "continue[d] to take the position that," because Miller's complaint focused on a vehicle allocation methodology that Volkswagen did not employ until late 1997 and because the proof at the first hearing and the commissioner's initial decision related solely to that time period, "the relevant time period . . . [was] the period during which the [customer satisfaction] based allocation process was in effect."

Volkswagen then filed with the commissioner a "Motion for Due Process Protections." Asserting its "due process right to know the charges against which it [was] being called upon to defend itself," Volkswagen asked the commissioner to dismiss the proceedings and require Miller to assert a new, valid complaint. Volkswagen argued that Miller's original February 1998 complaint, "by alleging only that [Volkswagen] was allocating vehicles in an improper manner[, was] not enough to indicate a possible violation of [Code § 46.2-1569(7)], given the Supreme

Court's October 31, 2003 ruling." It did not, Volkswagen further argued, articulate "how many vehicles Miller believe[d] it should have been shipped" or state "what models and series of additional vehicles [were] involved, what the relevant time period [was], or why additional vehicles should have been shipped." Alternatively, Volkswagen asked that, before the commencement of a formal evidentiary hearing, the commissioner conduct an "investigation into the bases of Miller's complaint" as required by Code § 46.2-1573(C), give Volkswagen any information in the commissioner's possession that could "be relied upon in making a decision adverse to Volkswagen," and provide Volkswagen with "formal notice of the legal and factual bases for the charges against it."

The case proceeded to an evidentiary hearing without apparent response from the commissioner to Volkswagen's motion.

At the hearing, Miller and Volkswagen stipulated that the transcripts and exhibits from the first evidentiary hearing were to be made a part of the record to avoid duplication. Miller presented additional evidence showing that, despite having ordered and requested delivery of such vehicles from Volkswagen, Miller received no 1998 Passats from Volkswagen during the six-month period from October 1997 through March 1998 and no New Beetles during the two-month period from February 1998 through March 1998. Miller's evidence further showed that, nationally, Volkswagen imported a total of 18,454 1998 Passats and 5,637 New Beetles during the same respective time periods for

distribution to its approximately 600 dealers.[5] In presenting this evidence, Miller took no position on how many 1998 Passats and New Beetles Volkswagen would have had to ship to Miller each month in order for those shipments to be deemed "equitably related" to Volkswagen's national importation figures. Instead, Miller argued that, in light of the significant number of 1998 Passats and New Beetles Volkswagen imported nationally from October 1997 through March 1998, Volkswagen's shipment to Miller of no such vehicles during those months was not equitably related to Volkswagen's national importation figures.

Volkswagen argued that its allocation of 1998 Passats and New Beetles to Miller was "equitable" because Miller's average "day supply" of those vehicles from March 1998 to December 1999 exceeded the national average.[6] However, Volkswagen's own evidence showed that it did not allocate any 1998 Passats to Miller from October 1997 through March 1998 or any New Beetles to Miller from February 1998 through March 1998. Thus, Miller's average "day supply" of 1998 Passats

[5] Specifically, Volkswagen imported 2,016 Passats in October 1997; 2,996 Passats in November 1997; 4,835 Passats in December 1997; 1,270 Passats in January 1998; 3,655 Passats in February 1998; 3,682 Passats in March 1998; 1,424 New Beetles in February 1998; and 4,213 New Beetles in March 1998.

[6] Volkswagen defined "day supply" as a dealer's "available inventory" divided by the dealer's "average daily sales rate." According to Volkswagen, "[d]uring [a] new model release, day supply [was] determined by applying sales rates based on months with available sales."

and New Beetles for those specific months was zero, and its percentage of the national "day supply" average was zero percent.

Volkswagen also presented evidence that it did not allocate any Passats to Miller in late 1997 and early 1998 because Miller had not yet acquired certain front-end alignment equipment necessary to repair the suspension system on the 1998 Passat.

After hearing the evidence presented, the hearing officer found that Volkswagen's admitted refusal to ship any 1998 Passats or New Beetles to Miller during the six-month period from October 1997 through March 1998 constituted a violation of Code § 46.2-1569(7).

Upon consideration of the record, the commissioner agreed with the hearing officer that Volkswagen violated Code § 46.2-1569(7) when it failed to ship any 1998 Passats to Miller from October 1997 through March 1998 and any New Beetles to Miller from February 1998 through March 1998. Those failures, the commissioner stated, "resulted in Miller not obtaining the number of [those] vehicles needed by Miller to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle importations being achieved nationally by each make, series, and model."

In reaching that decision, the commissioner recognized that Miller did not present evidence regarding the number of 1998 Passats and New Beetles it would have needed to receive "in order to

achieve a percentage of total new vehicle sales equitably related to the total new vehicle production or importations being achieved by Volkswagen nationally." Nevertheless, the commissioner concluded that "allocations of zero vehicles of a certain make, series, or model for one or more months would not be equitable." The commissioner reasoned that

> such an allocation would generally not satisfy the statutory requirement in months where, as in this case, the national importation numbers exceed[ed] the number of dealers nationally, and particularly where, as in this case, the vehicles are newly introduced makes, series or models. An allocation of zero vehicles, assuming a dealer has no such vehicles in inventory, translates to zero sales and zero sales, expressed as a percentage of new vehicle sales, would be zero percent. It is my opinion that shipping a number of vehicles that will enable a dealer to achieve or receive zero percent of the sales of a vehicle is generally not equitably related to national importation. . . .
>
> . . . Code § 46.2-1569(7) provides that it is unlawful for a manufacturer or distributor to "fail to ship monthly to any dealer, if ordered by the dealer[,]" the requisite number of vehicles specified by the statute. Based on the testimony in this case, it is undisputed

> that (i) Miller ordered and Volkswagen was aware of Miller's order for Passats during the months of October, November and December of 1997 and January, February and March of 1998 . . . and that Volkswagen declined to ship any Passats to Miller during those months. . . . It is also undisputed that Miller ordered and Volkswagen was aware of Miller's order for Beetles during the months of February and March of 1998 . . . and that Volkswagen failed to ship any Beetles to Miller during those months. . . . Further, during the relevant months, the national importations of the newly introduced Passats and Beetles exceeded the number of U.S. Volkswagen dealers and thus, there were sufficient numbers of these vehicles to send every U.S. dealer more than zero vehicles; however, Miller received zero.

The commissioner also found Volkswagen's "day supply" analysis unpersuasive with respect to the relevant six-month period from October 1997 through March 1998 because it "failed to show that, for the newly introduced Beetles and Passats, Miller's dayl] supply was equal to the national average for these specific vehicles." Moreover, the commissioner determined that, having been "admonished by the Supreme Court not to look at allocation formulas or methodologies" and instead "instructed to focus on the 'actual shipments to

Miller, the relevant national importation figures, and whether there was an "equitable" relationship between those numbers,'" he could not properly

> accept the day[] analysis presented by [Volkswagen], in this case, since it did not focus on and did not evaluate whether zero shipments of newly introduced Passats and Beetles to Miller in the relevant months provided the dealer with the number of these vehicles needed by Miller to receive a percentage of total new vehicles sales of each make, series, and model equitably related to the total new vehicle importations being achieved nationally by each make, series, and model.

The commissioner further found that Miller's failure to acquire the new front-end alignment equipment for the 1998 Passat had no bearing on the issue whether Volkswagen violated Code § 46.2-1569(7) when it failed to allocate any such Passats to Miller during the relevant time period. Noting that "Code § 46.2-1569(7) provides no exception to the allocation requirements set forth therein," the commissioner concluded:

> It is clear from the record that the reason that Volkswagen declined to ship Miller Passat's [sic] for the months of November 1997, December 1997, January 1998 and February 1998 was because Miller had not obtained certain front-end alignment equipment

> required by Volkswagen. While Volkswagen may have had good reason for requiring a dealer to obtain alignment equipment for these vehicles, nothing in . . . Code § 46.2-1569(7) would authorize Volkswagen to withhold vehicles from a dealer for this reason.

(Citations omitted).

On appeal, the circuit court affirmed the commissioner's decision, rejecting Volkswagen's claims that the commissioner acted in an unlawful manner and that Code § 46.2-1569(7) violates the United States and Virginia Constitutions.

This appeal followed.

II. ANALYSIS

On appeal to this Court, Volkswagen asserts five arguments to support its contention that the circuit court erred in affirming the commissioner's decision that Volkswagen violated Code § 46.2-1569(7) when it failed to ship Miller any 1998 Passats or New Beetles from October 1997 through March 1998. First, Volkswagen claims the commissioner failed to perform the analysis mandated by Code § 46.2-1569(7), as instructed by the Supreme Court in its October 31, 2003 opinion. Second, Volkswagen asserts the administrative record contains insufficient evidence to support the commissioner's decision. Additionally, Volkswagen contends the commissioner failed to follow

fundamental procedural requirements. Volkswagen further maintains that Code § 46.2-1569(7) violates the dormant Commerce Clause of the United States Constitution. Finally, Volkswagen posits that Code § 46.2-1569(7) violates the Due Process Clauses of the Virginia and United States Constitutions. We disagree with each of Volkswagen's arguments.

A. Standard of Review

Judicial review of the commissioner's decision is governed by the Administrative Process Act, Code §§ 2.2-4000 to 2.2-4031. See Code § 46.2-1573(A). Accordingly, Volkswagen, as the party challenging the commissioner's decision, bears the burden "to demonstrate an error of law" with respect to the issues whether the commissioner accorded constitutional rights, complied with statutory authority, and observed required procedures, and whether substantial evidence supports the commissioner's decision. Code § 2.2-4027.

"Under the 'substantial evidence' standard, the reviewing court may reject an agency's factual findings only when, on consideration of the entire record, a reasonable mind would necessarily reach a different conclusion." *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 441, 621 S.E.2d 78, 88 (2005). "In applying the substantial evidence standard, the reviewing court is required to take into account 'the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted.'" *Id.* at 442, 621 S.E.2d at 88 (quoting Code § 2.2-4027).

However, "'[i]f the issue falls outside the area generally entrusted to the agency, and is one in which the courts have special competence, i.e., the common law or constitutional law,' the court need not defer to the agency's interpretation." *Chippenham & Johnston-Willis Hosps., Inc. v. Peterson*, 36 Va. App. 469, 475, 553 S.E.2d 133, 136 (2001) (quoting *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 243-44, 369 S.E.2d 1, 8 (1988)); see also *Browning-Ferris Indus. v. Residents Involved in Saving the Env't, Inc.*, 254 Va. 278, 284, 492 S.E.2d 431, 434 (1997) (noting that, when reviewing issues "purely . . . of law, . . . we do not apply a presumption of official regularity or take account of the experience and specialized competence of the administrative agency"). "Thus, where the legal issues require a determination by the reviewing court whether an agency has, for example, accorded constitutional rights, failed to comply with statutory authority, or failed to observe required procedures, less deference is required and the reviewing courts should not abdicate their judicial function and merely rubber-stamp an agency determination." *Johnston-Willis, Ltd.*, 6 Va. App. at 243, 369 S.E.2d at 7-8.

In conducting its review, the court must view the facts "in the light most favorable to the agency." *Hilliards v. Jackson*, 28 Va. App. 475, 479, 506 S.E.2d 547, 549 (1998).

B. Propriety of the Commissioner's Analysis

Volkswagen contends the commissioner exceeded his statutory authority in finding that Volkswagen violated Code § 46.2-1569(7) because the commissioner failed, in making that finding, to perform the specific statutory analysis prescribed by the Supreme Court in its October 31, 2003 opinion. Volkswagen asserts the Supreme Court set forth in that opinion three specific determinations the commissioner had to make in order to find the statute had been violated. According to Volkswagen,

> [f]irst, the [c]ommissioner must determine, for a given month and for a given dealer, the percentage of total new vehicle sales of a vehicle by the dealer that is equitably related to the total national importation of that vehicle. Second, the [c]ommissioner must determine the number of vehicles that the dealer would need to have for it to receive such percentage of sales. Third, the [c]ommissioner must determine whether the dealer actually obtained from the distributor the number of shipments necessary to allow it to have such a number of vehicles.

Thus, Volkswagen argues, the commissioner could not "find a violation of the statute based solely on evidence comparing shipments to national importations." Rather, Volkswagen's argument continues, the commissioner had to expressly determine for a particular month what specific number of vehicles the distributor was required to ship to the dealer to allow the dealer to achieve a

percentage of total new vehicle sales that was equitably related to the total new vehicle importation of that vehicle being achieved nationally by the distributor. Hence, Volkswagen further argues, the commissioner was required to expressly "find that Miller needed to be shipped at least one vehicle before he could find that [Volkswagen] violated the statute by shipping zero vehicles." Volkswagen concludes that the commissioner's failure to expressly make that requisite finding constituted a rejection of the Supreme Court's interpretation of Code § 46.2-1569(7) and rendered the commissioner's analysis unlawful. We disagree.

In reversing this Court's prior decision in this case, the Supreme Court held that, in order to determine whether a violation of Code § 46.2-1569(7) has occurred, the commissioner must focus on the actual number of vehicles the distributor allocated to the dealer, rather than on the distributor's vehicle allocation methodology. *Volkswagen*, 266 Va. at 454, 587 S.E.2d at 532. Thus, the Court explained, the commissioner was required in this case "to consider the actual monthly shipments that Volkswagen made to Miller in relation to the number of new vehicles imported by Volkswagen on a national level in the particular vehicle categories covered under Miller's franchise agreement." *Id.* at 452, 587 S.E.2d at 531. The Court further explained that, "in conducting this examination, [the commissioner was required to] determine whether Miller obtained the number of such vehicles needed to receive a percentage of new vehicle sales 'equitably related' to the number of these types of vehicles imported by Volkswagen nationally." *Id.* Further explicating the

commissioner's need to "address[] the actual number of vehicles Miller received from Volkswagen in relation to national importation numbers," the Court indicated that the requisite statutory analysis required the commissioner "to consider the national importation numbers for the types of vehicles covered under Miller's franchise agreement" and "to address whether Miller received the number of vehicles needed to receive a percentage of new vehicle sales 'equitably related' to the quantity of these types of vehicles imported on a national level." *Id.* at 453, 587 S.E.2d at 531. Finally, the Court explained that the focus of the requisite analysis must be "on the actual shipments to Miller, the relevant national importation figures, and whether there was an 'equitable' relationship between those numbers." *Id.* at 454, 587 S.E.2d at 532.

It is clear from the Supreme Court's analysis of Code § 46.2 1569(7) that the commissioner's decision in this case must be supported by three specific findings: (1) the number of 1998 Passats and New Beetles Miller actually received from Volkswagen during each of the months at issue, (2) the number of 1998 Passats and New Beetles Volkswagen imported nationally during each of the same months, and (3) whether the number of 1998 Passats and New Beetles Miller actually received from Volkswagen during each of the months at issue permitted Miller to receive a percentage of new vehicle sales "equitably related" to the number of 1998 Passats and New Beetles Volkswagen imported nationally during each of the same months. Our review of the commissioner's written decision reveals

the commissioner made each of these required findings.

First, the commissioner found that Miller did not receive any 1998 Passats or New Beetles from Volkswagen during the period between from October 1997 through March 1998 following the respective introductions of those vehicles:

> Based on the testimony in this case, it is undisputed that . . . Miller ordered and Volkswagen was aware of Miller's order for Passats during the months of October, November and December of 1997 and January, February and March of 1998 and that Volkswagen declined to ship any Passats to Miller during those months. It is also undisputed that Miller ordered and Volkswagen was aware of Miller's order for Beetles during the months of February and March of 1998[] and that Volkswagen failed to ship any Beetles to Miller during those months.

Second, the commissioner found that Volkswagen, which had "approximately 600 Volkswagen dealers in the U.S." at the time, imported 2,016 Passats in October 1997; 2,996 Passats in November 1997; 4,835 Passats in December 1997; 1,270 Passats in January 1998; 3,655 Passats in February 1998; 3,682 Passats in March 1998; 1,424 New Beetles in February 1998; and 4,213 New Beetles in March 1998.

Third, the commissioner found that Volkswagen's failure to ship any 1998 Passats to Miller during the months of October 1997 through March 1998 and any New Beetles during the months of February 1998 and March 1998 did not permit Miller to receive a percentage of new vehicle sales equitably related to the number of 1998 Passats and New Beetles Volkswagen imported nationally during those same months:

> I conclude that Volkswagen's shipment of zero Passats and zero Beetles to Miller in these months, when it is clear that they were ordered by Miller, resulted in Miller not obtaining the number of these vehicles needed by Miller to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle importations being achieved nationally by each make, series, and model.

The commissioner reasoned that, because Miller had not previously received from Volkswagen any of the newly introduced 1998 Passats or New Beetles, "[a]n allocation of zero vehicles [during the relevant months] translate[d] to zero sales and zero sales, expressed as a percentage of new vehicle sales, would be zero percent." The commissioner further reasoned that "shipping a number of vehicles that will enable a dealer to achieve or receive zero percent of the sales of a vehicle is generally not equitably related to national importation," particularly where, as here, "the national

importations of the newly introduced Passats and Beetles exceeded the number of U.S. Volkswagen dealers and thus, there were sufficient numbers of these vehicles to send every U.S. dealer more than zero vehicles."

Based on these findings, the commissioner concluded that Volkswagen violated Code § 46.2-1569(7) when it failed to ship any 1998 Passats to Miller from October 1997 through March 1998 and any New Beetles to Miller from February 1998 through March 1998. Because, in reaching that decision, the commissioner focused on the actual number of vehicles the distributor allocated to the dealer, rather than on the distributor's vehicle allocation methodology, and made the three factual determinations required under Code § 46.2-1569(7), we conclude that the commissioner's analysis comported with the Supreme Court's analysis previously set forth in this case. *See id.* at 452-54, 587 S.E.2d at 531-32.

Indeed, notwithstanding Volkswagen's claim to the contrary, we find nothing in the Supreme Court's analysis that required the commissioner to expressly identify a particular number of 1998 Passats and New Beetles that Miller would have needed to receive during the relevant months in order to achieve a percentage of new vehicle sales equitably related to the number of 1998 Passats and New Beetles Volkswagen imported nationally during those months. While such an intermediate finding may, under some circumstances, assist the commissioner in making the third required finding, it is not, in itself, a required finding under the

statute. Here, the evidence showed that Miller did not receive any 1998 Passats or New Beetles from Volkswagen during each of the relevant months. Hence, the sole question before the commissioner was whether Miller's receipt from Volkswagen of zero 1998 Passats and New Beetles permitted Miller to receive a percentage of new vehicle sales equitably related to the number of 1998 Passats and New Beetles Volkswagen imported nationally during the same months. Effectively finding that the receipt of some number of such vehicles greater than zero was required to permit Miller to achieve the requisite sales percentage, the commissioner found that Miller's receipt of no such vehicles was not enough to satisfy Code § 46.2-1569(7). Actual identification of the specific number of vehicles that Miller needed to receive to attain the required sales percentage was unnecessary under the plain terms of the statute.

Having determined that the commissioner performed the appropriate statutory analysis prescribed by the Supreme Court, we hold that the commissioner did not exceed his statutory authority in finding that Volkswagen violated Code § 46.2-1569(7). Accordingly, the circuit court did not err in affirming the commissioner's decision on that basis.

C. Substantial Evidence

Volkswagen asserts the commissioner's finding that Volkswagen violated Code § 46.2-1569(7) is not supported by substantial evidence in the administrative record. We disagree.

Volkswagen presents two related arguments to support its assertion that the record lacks sufficient evidence to support the commissioner's decision. First and foremost, Volkswagen maintains the record lacks any evidence regarding "the critical factual finding required by . . . Code § 46.2-1569(7)," namely, the specific number of 1998 Passats and New Beetles that Miller would have needed to receive in each of the relevant months in order to achieve a percentage of new vehicle sales equitably related to the number of those vehicles imported nationally by Volkswagen during the same months. This argument is inextricably intertwined with Volkswagen's prior claim that Code § 46.2-1569(7) required the commissioner, before finding Volkswagen violated the statute, to specifically determine how many 1998 Passats and New Beetles Volkswagen had to ship to Miller to allow Miller to receive a percentage of total new vehicle sales that was equitably related to Volkswagen's national importation of those vehicles. Having previously concluded above that such a determination was not required under Code § 46.2-1569(7), we reject Volkswagen's argument that evidence to support such a determination must appear in the record.

Second, Volkswagen argues that the evidence in the record does not adequately support the commissioner's finding that Miller's sales percentage of zero during the relevant months when it received no 1998 Passats and New Beetles from Volkswagen was not equitably related to Volkswagen's national importation figures during the same months for those vehicles. According to Volkswagen, Miller failed to show that "it actually was equitably entitled

to make some percentage of U.S. sales of those particular vehicles" during those months. Volkswagen argues that,

> [g]iven Miller's historically small percentage of U.S. sales, given the very small number of Passats and Beetles actually being imported nationally by [Volkswagen] during those particular months, and given Miller's refusal to acquire necessary repair equipment that nearly every other dealer in the U.S. had purchased, . . . Miller was not equitably entitled to make any sales of Passats or Beetles during those months.

We find no merit in this argument.

For one thing, the record factually refutes Volkswagen's claim. It is undisputed that, although the smallest dealer by volume in its assigned sales district, Miller was a functioning dealership that continued, throughout the relevant months at issue, to actively sell Volkswagen vehicles. Miller, in fact, sold 47 new Volkswagen vehicles in 1997. In other words, Miller was not a defunct dealership—its overall, ongoing percentage of total new vehicle sales was not zero.[7] It is also undisputed that Volkswagen had approximately 600 dealers in the United States at the time, that Volkswagen imported 2,016 of the

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[7] Obviously, Miller had no pertinent sales percentage at the time specifically related to the 1998 Passat and New Beetle since those vehicles had just recently been introduced in the United States and Miller had not yet received any from Volkswagen.

popular, newly introduced 1998 Passats in October 1997; 2,996 Passats in November 1997; 4,835 Passats in December 1997; 1,270 Passats in January 1998; 3,655 Passats in February 1998; and 3,682 Passats in March 1998, and that Volkswagen imported 1,424 of the popular, newly introduced New Beetles in February 1998 and 4,213 New Beetles in March 1998. Thus, as the commissioner aptly noted, "the national importations of the newly introduced Passats and Beetles exceeded the number of U.S. Volkswagen dealers and thus, there were sufficient numbers of these vehicles to send every U.S. dealer more than zero vehicles." Accordingly, we conclude that substantial evidence supports the commissioner's finding that Miller's sales percentage of zero for the 1998 Passat and New Beetle was not equitably related to Volkswagen's national importation figures for those vehicles.

Moreover, we agree with the commissioner's determination that Miller's failure to purchase certain repair equipment had no bearing on the analysis prescribed by the Supreme Court. As previously mentioned, the Court, in considering the "plain and unambiguous" language of Code § 46.2-1569(7), held that the commissioner erred in considering "the component parts of Volkswagen's vehicle allocation methodology, and adjustments made to that process." *Id.* at 453, 587 S.E.2d at 531. The Court further held that the statute required the commissioner to focus not "on the business judgment of Volkswagen" but "on the actual shipments to Miller, the relevant national importation figures, and whether there was an 'equitable' relationship between those numbers." *Id.* at 454, 587 S.E.2d at

532 (emphasis added). Given the Court's clear instruction to focus solely on the numbers themselves, rather than on the rationale or "business judgment" behind them, we conclude that Volkswagen's decision not to send any 1998 Passats or New Beetles to Miller because Miller had not yet obtained certain repair equipment was not a pertinent or even permissible consideration under the statutorily required analysis.

We hold, therefore, that, contrary to Volkswagen's claim, substantial evidence supports the commissioner's decision that Volkswagen violated Code § 46.2-1569(7). Thus, the circuit court did not err in affirming the commissioner's decision on that basis.

D. Procedural Matters

Volkswagen contends the commissioner committed five "procedural errors" that required reversal of his decision that Volkswagen violated Code § 46.2-1569(7). Volkswagen alleges the commissioner (1) failed to dismiss Miller's complaint for failure to state a valid claim,[8] (2) failed on remand to conduct an investigation into the merits of Miller's complaint, (3) failed to provide notice of the charges to be tried at the hearing, (4) wrongfully delegated prosecution of the case to Miller, and (5) issued a decision on charges not made prior to the hearing. Therefore, Volkswagen concludes, the

[8] While we disagree with Volkswagen's characterization of this alleged error as "procedural," we nevertheless include it in this portion of the opinion for consistency's sake.

circuit court erred in affirming the commissioner's decision. We hold that the circuit court did not so err and briefly address the alleged procedural errors below.

1. Failure to Dismiss the Complaint

Volkswagen contends the commissioner erred in denying its motion to dismiss Miller's February 1998 complaint for failure to state a valid claim. According to Volkswagen, Miller's complaint no longer stated a valid claim on remand because, in light of the Supreme Court's decision, it failed to indicate a possible violation of Code § 46.2-1569(7) and because the lone claim it stated was factually moot. We disagree.

Volkswagen argues that Miller's complaint failed to indicate a possible violation of Code § 46.2-1569(7) on remand because, in remanding the case to the commissioner, "[t]he Supreme Court ruled that the statute regulates vehicle shipments, not vehicle allocation methodologies." "Miller's complaint letter," Volkswagen's argument continues, "complained only about [Volkswagen's] vehicle allocation system, and, indeed, only about the customer satisfaction component of that system." Thus, Volkswagen concludes, "in light of the Supreme Court's decision, Miller's complaint did not state a valid claim or indicate a possible violation of the statute."

Volkswagen also argues that Miller's complaint was factually moot on remand because Volkswagen "had long since adopted a new allocation methodology, and had ceased including a customer

satisfaction component in its allocation algorithm."[9] Thus, Volkswagen concludes, Miller's February 1998 complaint, "which objected to an abandoned allocation system, and, specifically, to the customer satisfaction component of that system, no longer stated a justiciable controversy."

Both of Volkswagen's arguments are premised on the assertion that Miller's 1998 complaint "complained only about [Volkswagen's] vehicle allocation system, and, indeed, only about the customer satisfaction component of that system." (Emphasis added). That assertion, however, is contradicted by the terms of the complaint. While it is true that Miller's complaint ostensibly focused on Volkswagen's allocation of vehicles "based on Customer Satisfaction Index," it is also true that at the heart of the complaint was Miller's comprehensive allegation that Volkswagen had violated Code § 46.2-1569(7) by failing to ship Miller "the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicles [sales of each make, series, and model equitably related to the total new vehicle] production or importation currently being achieved nationally by each make, series, and model covered under the warranty."

It was that core allegation that gave rise to the commissioner's previous examination of Volkswagen's entire allocation methodology—not just the customer satisfaction aspect of it—and, ultimately, to the Supreme Court's instruction that

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[9] The record indicates that Volkswagen abandoned it old allocation methodology in October 1999.

the resolution of the instant complaint under Code § 46.2-1569(7) turned not on Volkswagen's allocation methodology but on the actual number of vehicles Volkswagen shipped to Miller. At no point during the numerous proceedings of this case did the commissioner or the courts find that the scope of Miller's 1998 complaint was limited solely to Volkswagen's use of customer satisfaction scores to allocate new vehicles. Rather, the overriding issue throughout was whether, as Miller claimed in its 1998 complaint, Volkswagen's allocation of new vehicles to Miller failed to comply with the statute. And it was that same issue that remained valid and subject to examination and resolution on remand, in accordance with the Supreme Court's instruction.

Indeed, had the continuation of the case under the 1998 complaint been rendered invalid by the Supreme Court's decision or rendered factually moot by Volkswagen's revised allocation methodology, the Court could and likely would have ruled so and dismissed the case. See, e.g., *Franklin v. Peers*, 95 Va. 602, 602, 29 S.E. 321, 321 (1898) ("Whenever it appears or is made to appear that there is no actual controversy between the litigants, or that, if it once existed, it has ceased to do so, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case."). Instead, however, the Court remanded the case with instruction that the commissioner employ the analysis set forth in the Court's opinion to resolve Miller's claim that

Volkswagen violated Code § 46.2-1569(7).[10] *See Volkswagen*, 266 Va. at 454, 587 S.E.2d at 532.

We conclude, therefore, that the valid claim made in Miller's 1998 complaint that Volkswagen violated Code § 46.2-1569(7) by failing to ship Miller the requisite number of vehicles remained unchanged by Volkswagen's revised allocation methodology and the Supreme Court's ruling. Accordingly, the complaint was not invalid or moot upon the continuation of this case on remand, and the commissioner did not err in refusing to dismiss the complaint for failure to state a valid claim.

2. Failure to Investigate Complaint

Volkswagen contends the commissioner "compounded his procedural error" by refusing to investigate the merits of Miller's complaint on

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[10] As Volkswagen points out in its appellate brief, the commissioner, on remand, did allude in his decision to the possibility that Miller's claim may be "moot," given that "the facts [that gave] rise to this issue [were] relatively stale in light of the fact that they occurred approximately seven to eight years ago." It is clear, however, that the commissioner, in using the term "moot" in the introductory portion of his decision, was noting his general concern about the age of the case and the parties' continuing desire "to pursue [the] matter" despite its age, rather than addressing the question of mootness raised by Volkswagen here. The commissioner's prior denial of Volkswagen's motion to dismiss Miller's complaint for failure to state a valid claim and his subsequent analysis and rulings in his final decision clearly manifest the commissioner's belief that Miller's complaint was not rendered moot by Volkswagen's revised allocation methodology or otherwise invalidated by the Supreme Court's decision in this case.

remand, as required by Code § 46.2-1573(C). We disagree.

Code § 46.2-1573(C) provides that the commissioner "shall initiate investigations, conduct hearings, and determine the rights of parties under this article [(Code §§ 46.2-1566 to 46.2-1573.01)] whenever he is provided information by the Motor Vehicle Dealer Board or any other person indicating a possible violation of any provision of this article." According to Volkswagen, the statute requires the commissioner, upon receipt of an allegation of a statutory violation, "to conduct an independent investigation as to whether or not there is a legitimate basis to believe that an accused party actually has violated the law." The commissioner argues that the statute requires him, upon receipt of such an allegation, to merely investigate "whether there [is] a dispute between the parties." We need not decide which party is correct because, even if we assume, without deciding, that Volkswagen is correct that the commissioner is required, upon notification of a possible statutory violation, to investigate whether "there is a legitimate basis to believe that an accused party actually has violated the law," we nevertheless conclude that, under the circumstances of this case, no such investigation was required on remand.

As we indicated in the prior section above, this case arose upon Miller's 1998 complaint alleging that Volkswagen had violated Code § 46.2-1569(7) by failing to ship Miller the requisite number of vehicles. That complaint notified the commissioner of a possible statutory violation and served as the

basis for the proceedings in this case. After mediation proved unsuccessful, the commissioner conducted an evidentiary hearing on Miller's complaint and concluded that Volkswagen's allocation methodology had prevented Miller from acquiring a sufficient number of 1998 Passats and New Beetles to satisfy Code § 46.2-1569(7). On appeal, the Supreme Court rejected the analysis used by the commissioner and remanded the case so the commissioner could resolve the complaint using the correct legal standard. The case on remand was not a new, separate action. It was not based on a new allegation or any new information from Miller "indicating a possible [statutory] violation." Instead, it was a continuation of the same matter based on the same complaint. Thus, the commissioner's receipt of this case on remand did not constitute the receipt, under Code § 46.2-1573(C), of "information . . . indicating a possible [statutory] violation."

Moreover, in light of the prior proceedings in the case, the commissioner was already familiar on remand with the case and the merits of Miller's complaint. Thus, there was no need for the commissioner to conduct "an independent investigation as to whether or not there [was] a legitimate basis to believe that [Volkswagen] actually ha[d] violated the law." That basis already existed.

Because the remand of this case did not constitute the provision of new "information indicating a possible [statutory] violation" and because the commissioner already had a "legitimate basis to believe" that Volkswagen had violated Code

§ 46.2-1569(7), the commissioner was under no obligation to investigate the merits of Miller's complaint on remand. Thus, the commissioner did not err in refusing Volkswagen's request to do so.

3. Failure to Provide Notice of the Charges

Volkswagen also contends the commissioner erred on remand by failing to provide Volkswagen with "any notice of the factual and legal bases for the claims that would be presented at the formal evidentiary hearing." Volkswagen argues that "[s]uch notice would have had to advise [Volkswagen], prior to the hearing, of the interpretation of the statute that would be applied by the [c]ommissioner." We find no merit to Volkswagen's contention.

On remand, both the commissioner and the hearing officer clearly indicated in letters to Miller and Volkswagen that the issue to be heard on remand was the issue set forth in the Supreme Court's October 31, 2003 opinion. Stating that they "now [had] a clear indication from the Supreme Court on what [the commissioner was] required to consider in order to make a determination whether Volkswagen [had] violated . . . Code § 46.2-1569(7)," the commissioner directed that a hearing "be held consistent with the principles expressed in the [Supreme Court's] [o]pinion." The commissioner further stated that "Miller and Volkswagen should be prepared to offer to the hearing officer relevant documentation and evidence to address the issue of whether Miller obtained the number of vehicles needed to receive a percentage of new vehicle sales

'equitably related' to the quantity of these types of vehicles imported on a national level." The commissioner specifically directed Volkswagen to provide

> all relevant information and data which would delineate (i) Volkswagen's national importation numbers for the types of vehicles covered under Miller's franchise agreement for the time period in dispute, and (ii) the actual shipments received by Miller in relation to the national importation numbers achieved by Volkswagen during this same time period.

Following the prehearing conference, the hearing officer identified the time period in dispute[11] and noted that the issue to be heard was the same issue articulated by the Supreme Court and the commissioner, namely, "whether Miller . . . received the number of vehicles needed [to] receive[] a percentage of new vehicles equitably related to the number of vehicles imported by Volkswagen nationally."

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[11] To the extent that the hearing officer may have erred in identifying a time period that exceeded the time period addressed in the commissioner's decision following the first evidentiary hearing and implicitly referenced in the Supreme Court's October 31, 2003 opinion, we conclude that any such error was harmless since the six-month time period that served as the basis of Volkswagen's violation was well within the referenced time period.

Given the factual and legal clarity of the issue set forth in the Supreme Court's October 31, 2003 opinion and the commissioner's and hearing officer's unmistakable reference to the same issue, we hold that Volkswagen had adequate notice of the claims that would be presented at the evidentiary hearing.

4. Delegation of Prosecution

Volkswagen contends the commissioner further erred on remand "by delegating to Miller full authority to prosecute the claim against [Volkswagen] at the hearing." Volkswagen argues that the commissioner may only "delegate his prosecutorial responsibilities to another executive agency, such as the Office of the Attorney General." We need not consider the merits of this issue, however, because Volkswagen failed to properly preserve the issue below.

Although Volkswagen raised the same argument on appeal to the circuit court, we find nothing in the record of this case that indicates that Volkswagen raised the issue before the commissioner. "An appellant, under the provisions of the [Administrative Process Act], may not raise issues on appeal from an administrative agency to the circuit court that it did not submit to the agency for the agency's consideration." *Pence Holdings, Inc. v. Auto Center, Inc.*, 19 Va. App. 703, 707, 454 S.E.2d 732, 734 (1995), cited with approval in *Doe v. Virginia Bd. of Dentistry*, 52 Va. App. 166, 176, 662 S.E.2d 99, 104 (2008) (*en banc*).

Thus, having failed to raise this issue before the commissioner, Volkswagen is precluded from raising it on appeal. Accordingly, we will not consider the merits of Volkswagen's contention.

5. Charge against Volkswagen

Additionally, Volkswagen contends the commissioner erred on remand by finding Volkswagen guilty of a "charge that was not contained in any charging document." According to Volkswagen, Miller's 1998 complaint "continued to allege only that [Volkswagen] was operating an unlawful allocation system." It did not, Volkswagen further asserts, identify "any other charge against" Volkswagen. However, Volkswagen continues, the commissioner found that Volkswagen had violated Code § 46.2-1569(7) "not because of [Volkswagen's] allocation system, but because [Volkswagen] had failed to ship . . . certain vehicles to Miller during certain months." Thus, Volkswagen concludes, the commissioner "had no authority to make the specific finding that he did." We disagree.

As with its first claim of procedural error, Volkswagen's instant claim is based on the flawed premise that Miller's 1998 complaint complained only about Volkswagen's vehicle allocation system. Having previously concluded that Miller's complaint alleged that Volkswagen had violated Code § 46.2-1569(7) by failing to ship Miller the number of new vehicles required under the statute, we hold that Miller's complaint provided Volkswagen with adequate notice of the violation the commissioner found it to have committed.

Accordingly, the commissioner did not err in making that finding.

E. Dormant Commerce Clause

Volkswagen contends Code § 46.2-1569(7), as applied and on its face, violates the dormant Commerce Clause of the United States Constitution because it impermissibly regulates interstate commerce. We disagree.

The United States Supreme Court "has adopted a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Healy v. Beer Institute*, 491 U.S. 324, 337 n.14 (1989).

> "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."

Id. (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

In this case, Volkswagen first argues that Code § 46.2-1569(7), on its face and as applied, is per se invalid because it directly regulates interstate commerce. Volkswagen maintains that, by requiring distributors to ship motor vehicles to its Virginia dealers in accordance with production or importation levels "being achieved nationally," Code § 46.2-1569(7) "unlawfully controls the number of vehicles that the distributor may import into the U.S. and, as a result, has the practical effect of controlling commerce outside of Virginia." Moreover, Volkswagen argues, if adopted by other states, the statute "would create the likelihood of a gridlock of competing state regulations." These effects, Volkswagen maintains, constitute direct regulation of interstate commerce, in violation of the Commerce Clause.

The Supreme Court set forth in Healy the governing principles for determining whether a statute has an impermissible extraterritorial effect, as follows:

> First, the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State[.]" *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion); see also *Brown-Forman Distillers Corp.*, 476 U.S. at 581-83[.] . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries

> of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. *Brown-Forman Distillers Corp.*, 476 U.S. at 579. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. *Cf. CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88-89 (1987).

491 U.S. at 336-37.

The question before us, then, is whether Code § 46.2-1569(7), on its face or as applied, has the practical effect of controlling commercial activity wholly beyond Virginia's borders. If so, it is per se invalid. See *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995) (holding that a state statute is per se invalid under the Commerce Clause when it

has an extraterritorial effect, "that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state" (citing *Healy*, 491 U.S. at 336)).

For example, in *Brown-Forman Distillers Corp.*, the United States Supreme Court held that a New York statute requiring liquor distillers to affirm that their posted in-state prices for the coming month were no higher than the prices that would be charged for the same products in other states during the same month was per se invalid under the Commerce Clause. 476 U.S. at 582-84. The Court found that the statute effectively controlled prices in other states because, once the prices had been posted in New York, a distiller could not lower its prices in any other state. *Id.*

Similarly, in *Healy*, the Supreme Court struck down a Connecticut statute that required out-of-state beer shippers to affirm that the prices they charged in Connecticut were no higher than the lowest prices they charged for the same products in bordering states. 491 U.S. at 343. The Court held the statute to be unconstitutional because it had the impermissible practical effect of "controlling commercial activity wholly outside of" Connecticut. *Id.* at 337. The Court not only found that the statute controlled prices in neighboring states and interfered with the regulatory schemes in those states, but also observed that the enactment of similar legislation by several or all states would result in a "price gridlock." *Id.* at 340. Such regional or national regulation of commercial activity, the Court noted, is "reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal

through the extraterritorial reach of individual state statutes." *Id.*

The principles set forth in *Healy* and *Brown-Forman Distillers Corp.* are not limited to price-affirmation statutes. For instance, in *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), cert. denied, 511 U.S. 1033 (1994), the United States Court of Appeals for the Ninth Circuit held that a Nevada statute that required the NCAA to provide different "procedural due process protections" in Nevada enforcement proceedings than it provided in enforcement proceedings in other states violated the Commerce Clause per se because it directly regulated interstate commerce. *Id.* at 640. Noting that the NCAA required uniform enforcement procedures to operate effectively, the Ninth Circuit held that the practical effect of the Nevada statute was to require the NCAA "to apply Nevada's procedures to enforcement proceedings throughout the country." *Id.* at 639. "In this way," the court noted, the Nevada statute "could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders." *Id.* The court further observed that other states had and could enact legislation establishing rules for NCAA proceedings. *Id.* This, the court found, put the NCAA "in jeopardy of being subjected to inconsistent legislation arising from the injection of Nevada's regulatory scheme into the jurisdiction of other states." *Id.* at 640.

Here, however, unlike the statutes under consideration in *Healy*, *Brown-Forman Distillers Corp.*, and *NCAA*, Code § 46.2-1569(7) does not have an impermissible extraterritorial effect, either on its

face or as applied. For one thing, Code § 46.2-1569(7) does not have the practical effect of imposing direct controls on out-of-state commercial transactions, as did the price-control statutes in *Brown-Forman Distillers Corp.* and *Healy*. Nothing in the statute, as applied or on its face, ties the number of vehicles allocated to dealers in Virginia to the number of vehicles allocated to dealers in other states. Nor does the statute otherwise regulate the number of vehicles a distributor may allocate in any other state. Moreover, the statute contains no directive, or even suggestion, that vehicle allocations in other states are to be conducted in accordance with Virginia's requirements. Indeed, it references no other states and imposes no mandates or restrictions on them.

Likewise, Code § 46.2-1569(7) does not have the practical effect, on its face or as applied, of directly interfering with regulatory procedures or schemes in other states, as did the statute in NCAA. In essence, Code § 46.2-1569(7) merely requires that a distributor provide to a dealer in Virginia a number of new vehicles that is "equitably related" to that distributor's national production or importation of new vehicles. It places no restrictions, either expressly or by its practical effect, on how a distributor may allocate new vehicles in other states. Indeed, aside from requiring an "equitable" relationship between the number of vehicles a distributor ships to a Virginia dealer and the number of vehicles the distributor produces or imports nationally, Code § 46.2-1569(7) mandates no particular procedures or schemes for allocating new vehicles in Virginia. Thus, it cannot be said that the

instant statute would force Volkswagen "to apply [Virginia's allocation] procedures . . . throughout the country." *NCAA*, 10 F.3d at 639.

Furthermore, despite Volkswagen's assertion to the contrary, the effect of similar statutes being enacted in other states would appear to be negligible. Certainly, the passage of statutes that were truly similar to Code § 46.2-1569(7), in that they required a distributor's allocation of vehicles within the state to be "equitably related" to the distributor's national production or importation, without mandating specific allocation requirements or procedures, would not result in distributors being subjected to inconsistent obligations to states, as in *NCAA*, or "gridlock," as in *Brown-Forman Distillers Corp.* and *Healy*. We find nothing in the language of the statute or in the record to indicate that the adverse effects on interstate commerce asserted by Volkswagen would occur if similar legislation were passed in other states.[12]

Moreover, we are guided by the Supreme Court's rejection of a similar assertion in *Exxon Corp. v. Maryland*, 437 U.S. 117, 128-29 (1978). In that case, the Court considered the validity of a

[12] This is not to say, of course, that all statutes regulating the allocation of vehicles would have, if passed in several or all states, as inconsequential an effect on interstate commerce as the instant statute would. Indeed, we can imagine any number of possible allocation statutes whose cumulative effect on interstate commerce would, like the cumulative effects of the statues in *NCAA*, *Brown-Forman Distillers Corp.*, and *Healy*, be problematic under the Commerce Clause. That is not the case before us, however.

Maryland statute prohibiting producers of petroleum from operating retail service stations within the state. *Id.* at 119-20. Exxon and the other oil companies involved in the suit argued, inter alia, that the cumulative effect of other states passing legislation similar to Maryland's law would have serious implications on their national operations. *Id.* at 128. The Court responded to the appellants' argument as follows:

> While this concern is a significant one, we do not find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing. To be sure, "the Commerce Clause acts as a limitation upon state power even without congressional implementation." *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977). But this Court has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods. See *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U.S. 557 (1886); see also *Cooley v. Board of Wardens*, 53 U.S. 299, 319 (1851). The evil that appellants perceive in this litigation is not that the several States will enact differing regulations, but rather that they will all conclude that divestiture provisions are warranted. The problem thus is not one of national uniformity. In the absence of a relevant

> congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.

Id. at 128-29.

Here, we are aware of, and Volkswagen offers, no relevant congressional declaration of policy that persuades us the Commerce Clause pre-empts a state from regulating the allocation of motor vehicles to the dealers in that state, particularly where, as here, that regulation would have only a negligible effect on interstate commerce if adopted by other states.[13] Nor has Volkswagen made a showing of a

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[13] To the contrary, the congressional declaration of policy that most closely relates to Code § 46.2-1569(7) would seem to suggest otherwise. In enacting the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25, in 1956, Congress clearly recognized the need for government to "redress the economic imbalance and unequal bargaining power between large automobile manufacturers and local dealerships, protecting dealers from unfair termination and other retaliatory and coercive practices." *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 92 (3d Cir. 2000). The Act allows motor vehicle dealers to sue manufacturers or distributors with whom it has a franchise agreement for "failure to act in good faith in performing or complying with the franchise terms or in canceling, not renewing, or terminating the franchise." 15 U.S.C. § 1222. "The Act, however, does not protect dealers against all unfair practices, but only against those breaches of good faith 'evidenced by acts of coercion or intimidation.'" *Northview Motors, Inc.*, 227 F.3d at 93 (quoting *Salco Corp. v. General Motors Corp.*, 517 F.2d 567, 573 (10th Cir. 1975)). Indeed, as interpreted by the federal courts, the Act "plainly requires [a showing of] actual, or threatened, coercion or

specific discrimination against, or burdening of, interstate commerce.

Volkswagen also argues that Code § 46.2-1569(7), on its face and as applied, fails the second tier of the test used to analyze state regulations under the Commerce Clause because the statute's "burden on interstate commerce outweighs the local benefits." We disagree. Once a court finds that a statute "regulates evenhandedly to effectuate a legitimate local public interest" and has only an indirect effect on interstate commerce, the court must examine whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The purpose of Code § 46.2-1569(7) is to ensure that motor vehicle dealers located in Virginia are able to obtain a fair share of vehicles from their national distributors for the benefit of Virginia's motor-vehicle-buying public. See Code § 46.2-1501 ("The [c]ommissioner shall promote interest of the retail buyers of motor vehicles and endeavor to prevent unfair methods of competition and unfair or deceptive acts or practices."). Clearly, protecting Virginia's dealers against national distributors with more bargaining leverage and ensuring the fair allocation of new vehicles to dealers in Virginia greatly benefits Virginia's citizens. Thus, assuming arguendo that the statute has some incidental impact on interstate commerce, we hold that any such burden is not clearly excessive

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intimidation." *Id.* Limited thus, the Act cannot be read as pre-empting the distribution of motor vehicles within a state from state regulation that, like Code § 46.2-1569(7), requires no such showing.

in relation to the putative local benefits. Thus, we hold that Code § 46.2-1569(7) does not violate the Commerce Clause of the United States Constitution. Accordingly, the circuit court did not err in affirming the Commisioner's decision on that basis.

F. Due Process Clauses

Volkswagen contends Code § 46.2-1569(7) violates the Due Process Clauses of the Virginia and United States Constitutions because it is unconstitutionally vague. We disagree. "Every law enacted by the General Assembly carries a strong presumption of validity. Unless a statute clearly violates a provision of the United States or Virginia Constitutions, we will not invalidate it." *City Council v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 76"The burden is on the challenger to prove the alleged constitutional defect." *Perkins v. Commonwealth*, 12 Va. App. 7, 14, 402 S.E.2d 229, 233 (1991). "Because the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both." *Morrisette v. Commonwealth*, 264 Va. 386, 394, 569 S.E.2d 47, 53 (2002).

Volkswagen maintains that Code § 46.2-1569(7) is unconstitutionally vague because it offers no standard of enforcement for the commissioner and fails to provide fair warning of what conduct is prohibited. Specifically, Volkswagen maintains the statute fails to provide standards or guidance for determining how many new vehicles a distributor must ship to a particular dealer in order to achieve

the number of new vehicles that is "equitably related to the total new vehicle production or importation currently being achieved nationally." Because the term "equitably" is not defined in the statute and provides no guidance as to what conduct is lawful or what is prohibited and effectively delegates sole authority to the Commissioner to determine what number of new vehicles shipped to a dealer satisfies the statute, Code § 46.2-1569(7) is void for vagueness, Volkswagen argues. We are guided in our consideration of this issue by *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). In that case, the Supreme Court stated tha"'[[v]agueness] challenges to statutes which do not involve First Amendment freedoms must bexamined in the light of the facts of the case at hand.'" *Id.* at 495 n.7. The Court further stated that laws must not only "'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,'" but also "'provide explicit standards for those who apply them" in order to prevent "arbitrary and discriminatory enforcement." *Id.* at 498 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). The Court added, however, that

> [t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face

> economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. . . .
>
> Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

Id. at 498-99 (footnotes omitted).

Applying these standards for evaluating whether a statute is impermissibly vague to the present case, we find no merit in Volkswagen's vagueness argument. *See also Fallon Florist v. City of Roanoke*, 190 Va. 564, 590, 58 S.E.2d 316, 329 (1950) (holding that "a statute is not fatally indefinite because questions may arise as to its applicability, or opinions may differ with respect to what falls within its terms, or because it is difficult to enforce"). Code § 46.2-1569(7) regulates only

economic conduct and does not threaten any constitutionally protected rights. In addition, knowing it was immediately relevant to its allocation of newly manufactured vehicles, Volkswagen had the opportunity to consult the statute and clarify its meaning by inquiry. Moreover, the statute subjected Volkswagen solely to civil penalties in the event of a violation.

Thus, to sustain its void for vagueness challenge, Volkswagen had to show that Code § 46.2-1569(7) was vague, ""not in the sense that it require[d] a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct [was] specified at all."" *Village of Hoffman Estates*, 455 U.S. at 495 n.7 (quoting *Smith v. Goguen*, 415 U.S. 566, 578 (1974) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971))). Volkswagen, we conclude, failed to meet this burden.

Volkswagen knew, as a distributor of motor vehicles to dealers in Virginia, it was required under Code § 46.2-1569(7) to provide Miller with "the number of new vehicles . . . needed by the dealer to receive a percentage of total new vehicle sales . . . equitably related to the total new vehicle production or importation currently being achieved nationally." As previously mentioned, the underlying purpose of the statute is to ensure that dealers located in Virginia get their fair share of new vehicles from their distributors. The language challenged—"equitably" – is in "everyday usage and is commonly understood." *Southern Ry. Co. v. Commonwealth*, 205 Va. 114, 117, 135 S.E.2d 160, 164 (1964). The

term "equitably" means "in an equitable manner." Webster's Third New International Dictionary 769 (1993). "Equitable" means "fair to all concerned . . . : without prejudice, favor, or rigor entailing undue hardship." *Id.* Clearly, then, read naturally, Code § 46.2-1569(7) provided Volkswagen with notice that, in failing to allocate to Miller any of the very popular, newly introduced 1998 Passats and New Beetles from October 1997 through March 1998, despite having nationally imported and distributed to its other 600 or so dealers over 18,000 1998 Passats and over 5,000 New Beetles during that same period, it was engaging in conduct that was not "fair to all concerned" and not "without prejudice" and, thus, was prohibited by the statute.

Furthermore, as the Supreme Court said in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952),

> few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell our prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

In that same vein, the Supreme Court has distinguished between those statutes that are impermissibly vague and those that simply provide a flexible standard by which conduct is to judged. *See, e.g., Grayned*, 408 U.S. at 110 (observing that the words of an anti-noise statute that was not impermissibly vague were marked by "flexibility and reasonable breadth, rather than meticulous specificity"). Guided by these principles, we conclude, on the circumstances of this case, that Code § 46.2-1569(7) specifies a standard of conduct that, while necessarily flexible, was sufficiently definite and clear to provide an adequate standard of enforcement for the commissioner and give Volkswagen fair warning that its conduct was unlawful. Thus, we hold that Code § 46.2-1569(7) does not violate the Due Process Clauses of the United States and Virginia Constitutions. Accordingly, the circuit court did not err in affirming the commissioner's decision on that basis.

III. CONCLUSION

For these reasons, we affirm the circuit court's affirmance of the commissioner's decision that Volkswagen violated Code § 46.2-1569(7) when it failed to ship any newly introduced Passats to Miller from October 1997 through March 1998 and failed to ship any New Beetles to Miller from February 1998 through March 1998.[14]

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[14] Miller requests an award of attorney's fees and costs incurred in defending this appeal. Such matters, however, are strictly for the circuit court's consideration, not ours. See Code § 46.2-1573.01.

Affirmed.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

VOLKSWAGEN OF AMERICA, INC.,)
a corporation organized and existing under)
the laws of the state of New Jersey,)
)
Petitioner,)
)
v.)
)
DEMERST B. SMIT,)
Commissioner of the Virginia Department)
of Motor Vehicles,)
)
and MILLER AUTO SALES, INC.,)
a corporation organized and existing)
under the laws of the Commonwealth)
of Virginia,)
)
Respondents.)
)

ORDER

UPON CONSIDERATION of Appellant Volkswagen of America, Inc.'s appeal from the decision of the Commissioner of the Virginia Department of Motor Vehicles determining that Volkswagen of America, Inc. violated § 46.2-1569(7) of the Virginia Motor Vehicle Dealer Franchise Act, it is hereby

ADJUDGED, ORDERED, and DECREED

(1) That, in accordance with the Commissioner's determination, the evidence sustains the finding that Volkswagen of America, Inc. failed to provide Miller Auto Sales, Inc. with an equitable share of its new imported Volkswagen vehicles and that Volkswagen of America, Inc. therefore violated § 46.2-1569(7) of the Code of Virginia, 1950, as amended;

(2) That, upon review of Volkswagen of America, Inc.'s claim that § 46.2-1569(7) is unconstitutional, this Court finds that the statute is plain and unambiguous and gives fair notice and warning to automobile manufacturers of new vehicle allocation requirements for Virginia dealers; the Court therefore determines that the statute is not unconstitutionally vague; the Court likewise finds that the statute does not violate the Commerce Clause of the U.S. Constitution;

(3) That, regarding Volkswagen of America, Inc.'s claim that an informal fact-finding hearing is required pursuant to § 9-6.14:3 and § 9-6.14:11 of the Virginia Administrative Procedure Act, the Court specifically finds that Volkswagen of America, Inc. received adequate notice and that the issue of burden of proof was properly addressed in the administrative proceeding; the Court also finds that Miller Auto Sales, Inc.'s initial complaint letter was legally sufficient to initiate the instant proceedings;

(4) That, based on the foregoing findings, the decision of the Commissioner of the Virginia Department of Motor Vehicles is AFFIRMED.

This Court specifically incorporates by reference its letter opinion dated October 3, 2007 and, to the extent that any term or condition of this Order is contrary to the letter opinion, the letter opinion shall control.

ENTERED THIS ____ DAY OF NOVEMBER, 2007.

Melvin R. Hughes, Judge

Circuit Court of the City of Richmond